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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MILTON BARNES,

Petitioner,

vs.

MARTIN LOGAN;
KOREN LOGAN,
Trustees for the Logan
Inter Vivos Trust,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Are individual stockbrokers entitled to due process review of punishments imposed upon them through punitive damages awards in securities arbitrations?

PARTIES TO THE PROCEEDING

All of the parties in the Court of Appeals are identified in the caption. In addition, the following persons were parties in the district court, but did not enter an appearance in the Court of Appeals in this case: John G. Kinnard & Company, Inc. and Scott Grady.

Milton Barnes petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B) is reported at 122 F.3d 820. The memorandum and order of the District Court (Appendix C) is not reported in the Federal Supplement, and is cited as 1996 WL 310115 (N.D. Cal., May 29, 1996).

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1997. A petition for rehearing was denied on September 12, 1997 (Appendix A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The pertinent statutes are set forth at Appendix G.

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STATEMENT

A. Background

At issue is the due process adequacy of judicial review of a punitive damages award made by a National Association of Securities Dealers arbitration panel. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987), this Court emphasized the supervisory role that the Securities and Exchange Commission has in NASD arbitrations pursuant to a delegation of congressional authority:

> In 1953 . . . the Commission had only limited authority over the rules governing self-regulatory organizations (SROs) -- the national securities exchanges and registered securities associations -- and this authority appears not to have included any authority at all over their arbitration rules. Since the 1975 amendments to § 19 of the Exchange Act, however, the Commission has had expansive power to ensure the adequacy of the arbitration procedures employed by the SROs. No proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act, 15 U.S.C. § 78s(b)(2); and the Commission has the power, on its own initiative, to "abrogate, add to, and delete from" any SRO rule if it finds such changes necessary or appropriate to further the objectives of

> the Act, 15 U.S.C. § 78s(c). In short, the Commission has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.

Id. at 233-34, 107 S. Ct. at 2341 (citation omitted; footnote omitted).

As a condition of becoming a stockbroker, Mr. Barnes was required to participate in any NASD arbitration commenced by a customer. Jaffe, "Broker-Dealers and Securities, A Guide to the Regulatory Process," §§ 2.05, 3.13, pp. 23, 50 (1977). The U-4 form which he was required to sign as a condition of employment provides:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.

NASD Manual -- Administrative (CCH), p. 476 (1997). This agreement to arbitrate any customer claim at the insistence of the customer is reiterated at NASD Code of

Arbitration Procedure Rule 10301 and NASD Code of Arbitration Procedure Rule 10314(B) (NASD Manual -- Code of Arbitration Procedure (CCH), pp. 7571, 7577). Neither the rules, constitution or any bylaws of the NASD mention the term "punitive damages," nor does the U-4 form contain any indication that by signing it, a stockbroker waives his rights to due process review. By contrast, the NASD, as a registered association of securities broker/dealers, when enforcing members' compliance with applicable rules and regulations, is required to "provide a fair procedure for the disciplining of members and persons associated with members," including specified penalties designed to provide an appropriate sanction for specified types of misconduct. See generally, NASD Sanction Guidelines (1996). 15 U.S.C. § 78*o*-3(b)(8). Thus, the NASD provides for a hearing and a multi-stage review process for disciplinary proceedings, which is ultimately subject to SEC review, NASD Code of Procedure Rules and Rule 9370 (NASD Manual -- Code of Procedure (CCH), pp. 7337 *et seq.* and p. 7374); 15 U.S.C. § 78y(a); and final review by the United States Court of Appeals.

B. The Logans' Customer Complaint

Martin Logan and his wife had been customers of Milton Barnes beginning in 1989. They followed him from the brokerage firm of Bateman Eichler Hill Richards, Inc. to PaineWebber, and then to the Phoenix office of John G. Kinnard & Company, Inc., a brokerage firm based in Minneapolis, Minnesota. During the early years, the Logans specified an aggressive investment strategy, and during the early years, the account increased remarkably in value. Only after the account began to decline in 1994 did the Logans complain. In December 1994, the Logans initiated an NASD arbitration claim against Barnes, John G. Kinnard & Company and Scott Grady, Kinnard's branch manager.

In October 1995, the NASD conducted a four-day arbitration hearing in San Francisco. The three-arbitrator panel was comprised of one lawyer and two lay people.[1] The panel requested briefs on the parties' positions on punitive damages. In his, Barnes argued that no punitive damages were possible under California law, because the California Supreme Court in *Adams v. Murakami*, 284 Cal. Rptr. 318, 813 P.2d 1348, 1351 (1991), ruled that California law requires a plaintiff to introduce evidence of a defendant's net worth before an award of punitive damages can be made or sustained on appeal. Although some evidence was offered at the arbitration concerning Mr. Barnes' income, the plaintiffs did not offer evidence of his net worth. The arbitration panel made its decision in January 1996 (Appendix D). It awarded the Logans compensatory damages of $262,000 and $27,000 in interest jointly against John G. Kinnard & Company, Mr. Grady and Mr. Barnes. The panel also awarded punitive damages of $250,000 against Mr. Barnes and punitive damages of $500,000 against John G. Kinnard & Company. In the award, the panel specifically stated that the punitive damages award was based on California Civil Code § 3294.

C. Court Procedures to Confirm or Vacate the Award

Under the Federal Arbitration Act, 9 U.S.C. § 10, Mr. Barnes initiated an action in the United States District Court for the Northern District of California seeking to vacate the arbitration award. The Logans counterclaimed, asking that the award be confirmed. The district court entered

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[1] Under the NASD Code of Arbitration, there is no requirement that any panelist be a lawyer. NASD Manual -- Code of Arbitration Procedure, Rules 10104 and 10308 (CCH), pp. 7512 and 7574.

judgment for the Logans on June 21, 1996. Mr. Barnes appealed.

In reliance on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), the Ninth Circuit ruled, under the arbitration agreement, "the substantive law of Minnesota governs the availability of punitive damages." 122 F.3d at 822. The Court of Appeals went on to say that the arbitrators "acted beyond their authority and the applicable law in awarding punitive damages under California law, because the parties clearly had chosen Minnesota law as the governing law." *Id.* at 823.

Turning then to Minnesota law, the Court of Appeals noted that there is a conflict in different divisions of the Minnesota Court of Appeals about whether the Minnesota Supreme Court's decision in *Independent Sch. Dist. No. 622 v. Keen Corp.*, 511 N.W.2d 728, 732 (Minn. 1994), prohibits punitive damages in cases which do not involve personal injury. *Soucek v. Banham*, 524 N.W.2d 478, 480 (Minn. Ct. App. 1994), appears to bar punitive damages, whereas *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 428 (Minn. Ct. App. 1996), suggests that punitive damages should be allowed for deliberate disregard of rights, including for fraud. 122 F.3d at 823.

The Ninth Circuit agreed that in normal circumstances it would be required to decide whether punitive damages were available under Minnesota law for the types of claims made by the Logans against Mr. Barnes, but it held that it did not need to do so because the applicable standard of review under the FAA is "manifest disregard of law":

> Ordinarily, when we are faced with two conflicting decisions from a state's intermediate appellate courts, such as *Soucek* and *Molenaar*, "this Court must determine what decision the highest court [of the state] would reach if faced with the issue." [Citation omitted.] In this case, however, we need not engage in that analysis because the issue before us is not, precisely, what the Minnesota law of punitive damages is, but whether the arbitrators acted in manifest disregard of Minnesota law in awarding punitive damages.

Id.

Under the manifest disregard standard, the Ninth Circuit held, "we cannot conclude that the arbitrators acted in manifest disregard of Minnesota law in awarding punitive damages." *Id.* It further held that because, under a manifest disregard standard, a punitive damages award for fraud under Minnesota law would not be overturned, and that "the arbitrators' error in referencing California law in awarding punitive damages was harmless." *Id.* at 824. Despite the fact that the arbitrators had applied the wrong law and had applied it incorrectly, the Ninth Circuit therefore refused to vacate and remand the arbitrators' punitive damages award.

D. Other Related Punishments

The NASD has notified Mr. Barnes that his failure to pay the Logans' $250,000 punitive damages award will result in the cancellation of his NASD registration pursuant

to Article VI, Section 3 of the NASD By-Laws. NASD Manual -- By-Laws (CCH), p. 1054 (October 8, 1997 letter, Appendix E).

In addition, Mr. Barnes is the subject of NASD disciplinary proceeding, No. C3A960030 concerning the same securities transactions in the Logans' accounts. (A copy of the Statement of Complaint is Appendix F.)

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Decision Is in Conflict with the Decisions of this Court Requiring Meaningful Judicial Scrutiny of Punitive Damages Awards

1. History

We recognize that in earlier stages of judicial enthusiasm for arbitration, arbitrators have been given essentially unlimited license and have been subject to no effective review at all. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). But, this Court has been on a clear contrary course developing the doctrine of due process with special reference to punitive damages where the potential for unlicensed abuse is so great. This trend began with *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). There, the majority held that due process review of punitive damages awards is constitutionally required: "[W]e conclude that our task today is to determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable." *Id.* at 18, 111 S. Ct. at 1043. Noting its "concern about punitive damages that 'run wild,'" *id.*, the majority found that unlimited

discretion in the imposition of punitive damages, even in the hands of a judge, is constitutionally unacceptable:

> One must concede that the unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.

Id. We appreciate that in *Haslip* the due process test was held to have been achieved. The vital matter is the holding that there is a due process test, a heightened scrutiny of punitive damages awards is required and there must be a reasoned thought process not only in the award but in the review of the award.

Next, in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), the court produced five separate opinions, none of them a majority opinion. A majority of the justices, however, reaffirmed that the due process clause requires judicial review of punitive damages awards. *Id.* at 466-69, 113 S. Ct. at 2724-26; *id.* at 470-72, 113 S. Ct. at 2726-28; *id.* at 472-501, 113 S. Ct. at 2728-42.

In *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 2333, 129 L. Ed. 2d 336 (1994) this Court, concerned that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," struck down a long-standing Oregon constitutional prohibition against judicial review of the size of punitive damages awards. The Court rejected Oberg's contention that the trial court's jury instructions in the case contained "substantive criteria that provide at least as much guidance to the factfinders as the

Alabama statute and jury instructions" the Supreme Court upheld in *Haslip*. 512 U.S. at 418-19, 114 S. Ct. at 2334. It did so because, under the Oregon constitution, there was no judicial review to determine whether those instructions had, in fact, been followed. *Id.* In the Court's words:

> The problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict.

Id. at 433, 114 S. Ct. at 2341. Finding that the decision whether to impose punitive damages "should not be committed to the unreviewable discretion of a jury," this Court struck down the Oregon constitutional prohibition. *Id.* at 435, 114 S. Ct. at 2342.

2. The Direct Conflict

The decision of the Ninth Circuit below is in direct conflict with the reasoning of this Court in *Haslip* and the Court's holding in *Honda Motor Company*. This case is particularly apt, because in it, the Ninth Circuit demonstrably bypassed systems set up by two separate states, California and Minnesota, to assure adequate due process review of punitive damages awards. In doing so, it also demonstrated a fact that is not quite self-evident: Review under a manifest disregard of law test is tantamount to no review at all.

3. The California and Minnesota Due Process Requirements

Adams v. Murakami, 284 Cal. Rptr. 318, 813 P.2d 1348 (1991), an *en banc* decision, represents California's first

major attempt to assure compliance with the due process concerns this Court expressed in *Haslip*. 813 P.2d at 1355-56. In reversing a $750,000 punitive damages award because the plaintiff had presented no evidence of the defendant's financial condition, the court found that the consideration of a defendant's financial condition is necessary to determine how much a particular punitive award would punish the defendant in question. Quoting the Alabama Supreme Court with approval from *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989), it said:

> What (i.e., how much) will it take to punish *this* Defendant? . . . The gravity of the wrong may be the same, whether the defendant is a salaried employee or a multimillion dollar corporation, but, in the case of the former, the $220,000 verdict would be far out of proportion to its intended purpose. What it takes to punish the one bears no relationship to what it takes to punish the other.

813 P.2d at 1356. Although it did not reach the question of whether evidence of a defendant's financial condition is a constitutional prerequisite under *Haslip*, the California Supreme Court noted that "[a]t a minimum, however, the high court has made clear a constitutional mandate for meaningful judicial scrutiny of punitive damages awards." *Id.* It is just such meaningful scrutiny that the Ninth Circuit refused to apply.

Minnesota, too, has concluded that "because of the open-ended and volatile nature of punitive damages, appellate courts must exercise 'close control over the imposition and assessment of punitive damages.'" *Bradley v. Hubbard*

Broadcasting, Inc., 471 N.W.2d 670, 679 (Minn. Ct. App. 1991), *quoting Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 835 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989). In Minnesota there is a statute, Minn. Stat. § 549.20 subd. 3, designed "to permit greater trial and appellate court scrutiny of punitive damages," which "is significantly more detailed than the Alabama statute that passed scrutiny in *Pacific Mutual.*" *Bradley*, 471 N.W.2d at 678.

In addition to the controversy over whether Minnesota law permits punitive damages in cases which do not involve physical injury, discussed in *Barnes v. Logan*, 122 F.3d 820, and at p. 5 *supra*, Minnesota Statute § 549.20 subd. 3 (1990) requires consideration of "the financial condition of the defendant and the total effect of other punishments likely to be imposed on the defendant as a result of the misconduct . . . ."[n2]

The California and Minnesota statutes are not two peas in a pod.[3] Under a due process standard of close judicial

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[2] Mr. Barnes is presently the subject of an NASD disciplinary proceeding in which he could be fined up to $50,000 plus return of commissions and barred permanently from the securities industry. See NASD Sanction Guidelines (1996), p. 10.

[3] For example, California Civil Code § 3294 requires clear and convincing evidence that enumerated conduct occurred; Minnesota requires clear and convincing evidence not just that the enumerated conduct occurred but, in addition, that the defendant "has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights of others." Minn. Stat. § 549.20 subd. 3. California, on the other hand, focuses upon

scrutiny, the punitive damages award should have, without doubt, been vacated and the case remanded for consideration under the due process criteria embodied in Minnesota's punitive damages statutes.

4. "Manifest Disregard," a Standard Tantamount to No Review

Instead, the Ninth Circuit made its review under the "manifest disregard of law" standard of 9 U.S.C. § 10, the Federal Arbitration Act. Under this standard, the court found that (1) it did not even need to reach the question of whether punitive damages were available in the absence of personal injury under Minnesota law and (2) that the panel's erroneous application of California law was "harmless." *Barnes*, 122 F.3d at 824.

If it could do this, the "manifest disregard" standard is tantamount to no standard at all. Under it, courts must confirm arbitration awards even where they are attributable to "'erroneous findings of fact or misrepresentations of law.'" *French v. Merrill Lynch, Pierce, Fenner & Smith*, 784 F.2d 902, 906 (6th Cir. 1986), *quoting American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 682 F.2d 1280, 1285 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983). "It is not even enough that the

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whether the defendant has been guilty of (among other things) "malice," a concept which Section 3294 of the California Civil Code subd.(c)(1) describes as including "despicable conduct." Thus, by applying the California statute, then following the California statute, California could have concluded that punitive damages were appropriate due to "despicable conduct" without ever finding the "high probability" of injury required in Minnesota.

Panel [of arbitrators] may have failed to understand or apply the law. . . . An arbitrator's decision must be upheld unless it is 'completely irrational,' or it constitutes a 'manifest disregard of the law.'" *French*, 784 F.2d at 906. In *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995), the Ninth Circuit explained that "manifest disregard of the law" means:

> something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. It must be clear from the record that the arbitrators recognized the applicable law and then ignored it.

(Citations omitted.) *See also San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) ("manifest disregard of the law" might be present authorizing vacation or setting aside of an arbitrators' award when the arbitrators understand and correctly state the law but proceed to disregard it); *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989) ("manifest disregard of the law" by arbitrators is a judicially created ground for vacating arbitration awards, and refers to error which was obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator; the doctrine implies that the arbitrator appreciates the existence of clearly governing legal principle but decides to ignore it or not pay attention to it).

The standard is virtually illusory. Under it, an arbitration panel can avoid review simply by failing to communicate that (1) it knew the correct law, and (2) chose to ignore it. Mr. Barnes' memorandum to the panel argued that the case was controlled by Minnesota law, but there

was no manifest disregard according to the Ninth Circuit, because the arbitration panel did not explicitly acknowledge that it understood that Minnesota law applied but chose to disregard it. 122 F.3d at 823-24. Small wonder that 9 U.S.C. § 10 n.11 (manifest disregard of law) reports no cases overturned on the grounds of manifest disregard of the law (1970 and 1997 Supplement). Similarly, the Uniform Arbitration Act (ULA) § 12 n.151 (manifest disregard of agreement or law) (Vol. 7 1997) reveals no cases where an arbitration award was vacated or remanded on the basis of manifest disregard of the law.

5. The *Todd Shipyards* Evasion

In its opinion below, the Ninth Circuit made no effort to justify its decision under the Due Process Clause. In this, it is at odds with *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 139 (6th Cir. 1996), which assumed, albeit without deciding, that punitive damages awards rendered by arbitrators are subject to due process review (but which found no denial of due process on the unique facts of the case).

Instead, relying on *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991), the Ninth Circuit held that Mr. Barnes had waived his right to due process review when he had agreed to arbitration.[4] *Todd Shipyards*

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[4] *In dicta* the Ninth Circuit also suggested that since the punitive damages award of $250,000 awarded against Mr. Barnes was less than the $262,000 in compensatory damages for which he was made jointly liable, the award was not "grossly excessive." 122 F.3d at 824. As pointed out in *Adams v. Murakami, supra*, this type of reasoning may make sense when the defendant is a multimillion dollar corporation, but it does not adequately assess the punitive

is distinguishable because it involved two large companies who, being fully informed actually did agree, through a negotiated contract, that all their claims against one another would be resolved through AAA arbitration. By contrast, Mr. Barnes was required to sign a U-4 as a condition of his employment, and nothing in the text of the U-4 or the rules of the NASD suggest that he could be subject to severe financial sanctions through arbitration -- as opposed to the due process review provided through the NASD's normal disciplinary channels -- without any right to meaningful review of any monetary punishment awarded against him. He was not told, and could not know, that by signing a U-4 he was signing away his constitutional rights as an American citizen.

Alternatively, if *Todd Shipyards* is read as allowing arbitrators to trample due process rights, we respectfully suggest: it was wrongly decided. As intended by the founders, this Court should announce that no American citizen will be subjected to potentially ruinous financial punishments through a government sanctioned[5] dispute

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impact on an individual defendant. See discussion of *Adams v. Murakami* at pp. 9-10. In reality, a nondischargeable punitive damages award accruing interest may effectively constitute a sentence to a life of impoverishment.

[5] The Logans may attempt to alternatively argue that NASD arbitrations do not involve "state action." As applied to the NASD, this position is not plausible. In order to be a stockbroker, federal law required that Mr. Barnes join the NASD, and all NASD organic documents, rules and regulations are subject to SEC approval and can be changed by the SEC at its discretion. According to these SEC approved rules, if Mr. Barnes does not pay the

resolution process without the protection of due process review.

B. This Court's Intervention Is Needed, Now, to Provide Further Guidance for the Arbitration of Securities' Claims

The privatization of dispute resolution is a burgeoning phenomenon. In the words of Joyce Luther Kennard, Associate Justice of the California Supreme Court, "Today, arbitration has spread to every major commercial context . . . if you go to the bank or the doctor, or make a purchase or take a new job, there is a good chance you will run into

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award against him, the NASD will revoke his membership, which in turn will cancel his license with the SEC and thereby conclude his career as a stockbroker. See discussion p. 2 *supra*. *Shearson/American Express*, 482 U.S. at 234, 107 S. Ct. at 2341. Indeed, it is the SEC's approval of rules which do not require a due process review mechanism for arbitration awards, similar to those of the NASD disciplinary procedures, that has created the constitutional question posed by the case at bar. Furthermore, in order to make the arbitration award final and collectible, it must be confirmed by the federal district court. 9 U.S.C. § 9. In short, the government has created the legal framework governing the conduct of the NASD and has engaged in state action by its delegation of authority to the NASD. *See West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (state may delegate authority to a private party and thereby make that party a state actor); *see also National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 193-94, 109 S. Ct. 454, 462-63, 102 L. Ed. 2d 469 (1988) (finding no state action by the NCAA: only because "no official authority has been conferred on it by any government . . .").

an arbitration agreement." Remarks of Joyce Luther Kennard at National Conference of Commissioners on Uniform State Laws, quoted by Michael Yablonski in "Conference Considers Overhaul of Arbitration Act," Litigation News, Vol. 22, No. 6, p. 6 (September 1997). The American Arbitration Association reports that its "overall case load rose to a record 70,516 cases, an increase of about 13% year to year . . . ." American Arbitration Association Annual Report 1996, p. 5. The Securities Arbitration Commentator tallies the NASD's total cases concluded during the past three years:

1994	4,561
1995	5,680
1996	6,331

Securities Arbitration Commentator, Vol. IX No. 3, p. 15 (October 1997).

Of the trend there can be no doubt. As the privatization of dispute resolution continues at its current pace, the important due process safeguards this Court has crafted in *Haslip*, *Honda Motor Company Ltd.* and *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), risk becoming increasingly irrelevant anachronisms.

It is, perhaps, understandable, given the benefits privatization brings to overcrowded court dockets, if a grateful judiciary is inclined to leave arbitration well enough alone. Why, after all, look a gift horse in the mouth? The answer -- as this case demonstrates -- is that all aspects of privatization are not well. If a crushing financial penalty can be capriciously imposed upon a citizen with no meaningful review, something in the system is broke, and this Court is the only institution that can fix it.

If it fails to do so, confidence in the arbitration process will erode, discouraging participation in arbitration and thus defeating the pro-arbitration policies endorsed by this Court. *See, e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985), and *McMahon*, 482 U.S. 220.

This Court moved broker/customer disputes from the courts into arbitration with a trio of cases which first disapproved, then overruled its earlier prohibition against arbitration of securities claims, established by *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953). The three cases, decided in four years, *Byrd*; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987); and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989), have moved virtually all customer/broker disputes from court to arbitration.

As it happened, this Court assuaged the fears of anxious litigants now compelled into arbitration. It provided this assurance in *McMahon*:

> Ordinarily, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

482 U.S. at 229-30, 107 S. Ct. at 2339, and, later:

> Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential

> restriction on substantive rights. [Citation omitted.] Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

Id. at 232, 107 S. Ct. at 2340.

Similarly, in the concluding paragraph of its opinion, the majority in *Rodriguez de Quijas* justified its decision by proclaiming that the rights of citizens would be protected in the arbitration process:

> Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.

490 U.S. at 485-86, 109 S. Ct. at 1922.

As Mr. Barnes' experience demonstrates, where punitive damages are involved, this Court's prophesies of procedural fairness are not borne out by experience.

If this Court is to protect the high ideals it professed when rerouting litigation into private dispute resolution, then this Court must actively exercise its supervisory authority over what is on its way to becoming this nation's most important forum for dispute resolution. Through *Byrd, McMahon, Rodriguez de Quijas,* and most recently,

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), this Court has not only brought securities litigants into arbitration, but provided meaningful guidance on the conduct of securities arbitrations. The job, however, is not done. To this question we need an answer: In arbitration, must there be due process protection against the capricious or unsound imposition of punitive damages awards?

C. If this Nation's 500,000 Brokers Are To Be Subjected to the Prospect of Unreviewable, Ruinous Punitive Damages Awards through Securities Arbitration, at Least They Should be Informed of the Danger by the Nation's Highest Court

There are over 505,000 registered securities professionals and 5,400 securities firms with over 58,000 branch offices that are members of the NASD (NASD Website www.NASD.com). By contrast, the entire population of the United States in 1790 was only 3,929,214. Statistical Abstract of the United States GPO, U.S. Dep't of Commerce, Bureau of the Census, 1996, p. 8. It is therefore not unreasonable to assume that the drafters of the Due Process Clause would have found their number significant and would have been concerned if a government-sanctioned, government-controlled organization could then have inflicted large, unreviewable financial punishments upon so many of its citizens.

The Ninth Circuit approach creates an intolerable injustice for the injustice visited upon individual NASD members who are subjected to virtually unreviewable punitive damages claims. Although those who sign on to

become stockbrokers have clear notice of a disciplinary system which, subject to multiple stages of review, can sensor, fine, suspend or bar them, as Justice Thomas pointed out dissenting in *Mastrobuono*, the words "punitive damages" do not even appear in the NASD Code:

> The majority cannot find a provision of the NASD Code that specifically addresses punitive damages, or that speaks more generally to the types of damages arbitrators may or may not allow. Such a rule simply does not exist.

514 U.S. at 69, 115 S. Ct. at 1221. The NASD Code provides no notice that, unlike the carefully structured NASD disciplinary procedures, there is effectively no review of a punitive damages award, no matter what its size, when rendered against an individual broker.

The consequences are harsh indeed. Here, the punitive damages award against Mr. Barnes was for a quarter of a million dollars. Judgments for fraud are nondischargeable under § 523 of the United States Bankruptcy Code, and arbitration awards can create a collateral estoppel. See Restatement (Second) of Judgments § 84 (1982). It is thus possible under the NASD Code that a three-member panel, which includes no lawyer, can impose upon a citizen a crushing, nondischargeable, interest-accruing debt which will, in practical effect, condemn its victim to a lifetime of poverty. This is a far cry from this Court's promise in *Rodriguez de Quijas* and *McMahon* that the substantive rights of parties to arbitrations would be protected. See discussion pp. 18-19, *supra*. This case provides that opportunity.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and this case remanded to the Ninth Circuit with instructions that the punitive damages award against Mr. Barnes should be subjected to the close scrutiny of punitive damages awards required by the Due Process Clause of the United States Constitution.

RESPECTFULLY SUBMITTED, December 1997.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILTON BARNES, Petitioner-Appellant, vs. MARTIN LOGAN; KOREN LOGAN, Trustees for the Logan Inter Vivos Trust, Respondents-Appellees.	No. 96-16299 DC No. CV 96-957 MHP **ORDER**

Before: HUG, Chief Judge, and FARRIS and TASHIMA, Circuit Judges.

Petitioner-appellant's petition for rehearing is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILTON BARNES,	)	
	)	No. 96-16299
Petitioner-Appellant,	)	
	)	DC No. CV 96-957 MHP
vs.	)	
	)	**OPINION**
MARTIN LOGAN;	)	
KOREN LOGAN,	)	
Trustees for the Logan	)	
Inter Vivos Trust,	)	
	)	
Respondents-Appellees.	)	
	)	

Argued and Submitted July 15, 1997.

Decided August 20, 1997.

Frank Lewis, Begam, Lewis, Marks & Wolfe, Phoenix, AZ, for petitioner-appellant.

Craig M. Hughes, Zelle & Larson, San Francisco, CA, for respondents-appellees.

Appeal from the United States District Court for the Northern District of California; Marilyn H. Patel, District Judge, Presiding. D.C. No. CV-96-00957-MHP.

Before: HUG, Chief Judge, and FARRIS and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

This is an appeal from a judgment of the district court confirming an arbitration award under the Federal Arbitration Act, 9 U.S.C. §§ 9, 10. The district court had jurisdiction under 28 U.S.C. § 1332.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND

Respondents-appellees Martin and Koren Logan, husband and wife, and trustees of the Logan Revocable *Inter Vivos* Trust (collectively, Logan), were long-time customers of petitioner-appellant Milton Barnes (Barnes), a registered securities representative. Logan had followed Barnes from two prior brokerage houses to John G. Kinnard and Company, Inc. (Kinnard & Co.)

Logan, claiming that his account at Kinnard & Co. had been mismanaged and had declined in value from $464,000 to $269,000 in nine months, during which period Barnes had earned $123,000 in commissions, instituted an arbitration proceeding against Barnes, Kinnard & Co. and Scott R. Grady, the Kinnard & Co. Branch Manager in Phoenix. At issue in the arbitration were Logan's investment objectives, the extent of his "sophistication," how Barnes managed the account, and related issues (such

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[1] The Federal Arbitration Act does not independently confer jurisdiction. *Garrett v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*,, 7 F.3d 882 (9th Cir. 1993).

as asserted misrepresentations by Barnes and whether Barnes had engaged in churning the account).

Resolving the factual disputes in Logan's favor, a panel of arbitrators (arbitrators), appointed under the rules of the National Association of Securities Dealers (NASD), awarded Logan $261,561 in compensatory damages, plus $27,463 in pre-award interest. This award was made jointly and severally against Barnes, Kinnard & Co. and Grady. They also awarded Logan $500,000 in punitive damages against Kinnard & Co. and Grady, and $250,000 in punitive damages against Barnes. Barnes petitioned the district court to vacate the award against him, *i.e.*, the joint and several award of $261,561 (plus interest) in compensatory damages and the separate award against him of $250,000 in punitive damages.[2] The district court denied Barnes' petition to vacate the arbitration award and granted Logan's motion to confirm the award. Barnes timely appeals.

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[2] We have been informed that Kinnard & Co. and Grady have settled with Logan and that the amount of the settlement is less than Kinnard & Co. and Grady's total liability under the award. We therefore assume, for the purpose of deciding this appeal, that Barnes' contention regarding compensatory damages (which were awarded jointly against him, Kinnard & Co. and Grady) has not been rendered moot by the settlement. We leave the determination of this issue, *i.e.*, the extent to which, if at all, the Kinnard & Co. and Grady settlement discharged Barnes' joint and several liability to Logan for compensatory damages, to the district court in judgment enforcement proceedings or otherwise.

II. STANDARD OF REVIEW

Appellate courts review the confirmation or vacation of an arbitration award like "any other district court decision . . . accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*." *First Options, Inc. v. Kaplan*, 514 U.S. 938, 947, 115 S. Ct. 1920, 1926, 131 L. Ed. 2d 985 (1995) (citation omitted); *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir.), *cert. dismissed*, ___ U.S. ___, 117 S. Ct. 30, 135 L. Ed. 2d 1123 (1996). However, judicial review of an arbitrator's decision "is both limited and highly deferential." *Sheet Metal Workers' Int'l Ass'n v. Madison Indus., Inc.*, 84 F.3d 1186, 1190 (9th Cir. 1996). An award will not be set aside unless it manifests a complete disregard of the law. *Id.* Thus, an award must be confirmed if the arbitrators even arguably construed or applied the contract and acted within the scope of their authority. *United Food & Commercial Workers Int'l Union v. Foster Poultry Farms*, 74 F.3d 169, 173 (9th Cir. 1995). We may affirm the judgment of the district court on any ground fairly supported by the record. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989).

III. ANALYSIS

A. Punitive Damages

1. Choice of Law

The Customer Agreement between Logan and Kinnard & Co. provided in its paragraph 14, *Choice of Laws:*

> This agreement shall be deemed to have been made in the State of Minnesota and shall be construed, and

> the rights and liabilities of the parties determined, in accordance with the laws of the State of Minnesota.

Barnes contends that the arbitrators erred in awarding punitive damages because (1) the agreement is governed by Minnesota law, and (2) punitive damages are not permitted under Minnesota law where the only injury is economic.

In *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), the Court held that the parties to an arbitration agreement could agree to which state's laws governed, even where the law chosen differed from the Federal Arbitration Act. *Id.* at 479, 109 S. Ct. at 1256. This principle was somewhat refined in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). There the Client's Agreement contained an arbitration clause and a choice-of-law provision. The latter specified that the agreement was governed by New York law. *Id.* at 54-56, 115 S. Ct. at 1215. New York decisional law held that only judicial tribunals, and not arbitrators, were empowered to award punitive damages.[3] *Id.* The Court held that application of that caselaw was inconsistent with the Federal Arbitration Act and construed the choice-of-law provision, as follows:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that

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[3] *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976).

> New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

Id. at 63-64, 115 S. Ct. at 1219.

Both sides claim to find support for their respective positions in *Mastrobuono*. Barnes contends that the substantive law of Minnesota governs the availability of punitive damages and, therefore, under *Masterbuono*, we must look to the Minnesota decisional law to determine if punitive damages were appropriately awarded. Logan contends that *Mastrobuono* stands for the proposition that because the parties chose to abide by the NASD rules of arbitration, and the NASD rules allow arbitrators to award punitive damages, punitive damages were appropriately awarded in this case. The Minnesota caselaw at issue, unlike the New York case involved in *Mastrobuono*, is part of the *substantive* law of Minnesota -- it is not a law that limits arbitrators or applies only to arbitration proceedings. It addresses the kinds of injuries for which punitive damages can be awarded.

In this respect, this case is similar to *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995). *Gateway* involved an arbitration in which the arbitrator awarded $2 million in punitive damages. However, applying the holding of *Mastrobuono*, the court held that because punitive damages were available under applicable state law only for torts, and that case involved only a breach of contract, the arbitrator's award of punitive

damages was beyond his authority. *Id.* at 999 (also collecting cases), 1001. This case is like *Gateway* and unlike *Mastrobuono* in that the law on punitive damages, discussed below, is the substantive law of Minnesota.

The arbitrators expressly in this case awarded punitive damages "pursuant to Section 3294 of the California Civil Code and pursuant to *Mastrobuono.*" Thus, they acted beyond their authority and the applicable law in awarding punitive damages under California law, because the parties clearly had chosen Minnesota law as the governing law. However, as we demonstrate below, this error was harmless.

The Minnesota Supreme Court has held, at least in products liability cases, that punitive damages are recoverable only in cases of personal injury and not for economic injury.

> [T]he school district here only suffered property damage. The remedy of punitive damages concerns the "vital state interest of protecting persons against personal injury." We believe . . . that denying punitive damages where a plaintiff only suffers property damage reflects the greater importance society places on protecting people.

Independent Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728, 732 (Minn. 1994) (citation omitted) (*Keene*). *Keene* has been broadly interpreted as barring punitive damages in all cases not involving personal injury. *Soucek v. Banham*, 524 N.W.2d 478, 480 (Minn. Ct. App. 1994). However, *Soucek*, in turn, has been limited by what seems to be a more sensible interpretation of *Keene*. The latest

expression from a Minnesota appellate court limits *Keene* to products liability actions and permits the award of punitive damages for the deliberate disregard of rights, including for fraud. *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 428 (Minn. Ct. App. 1996).

Barnes contends that the arbitrators' decision should be vacated because they failed properly to apply Minnesota law. This contention is based on Barnes' reading of *Soucek* that, under *Keene*, punitive damages cannot be awarded in any case that does not involve personal injury. In his reply brief, he contends that *Molenaar*, which was not decided until after the arbitration was completed, represents a change in the law. On this basis, Barnes suggests that the arbitrators should have followed Minnesota law as it existed at the time of the arbitration.

On the other hand, Logan contends that Minnesota permitted punitive damages to be recovered for fraud well before *Molenaar*, citing *Jensen v. Peterson*, 264 N.W.2d 139, 144 (Minn. 1978). Logan is correct, at least in the sense that the Minnesota Supreme Court has continued to approve the award of punitive damages in cases not involving personal injury. *See, e.g., Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 277 (Minn. 1995) (approving award of punitive damages, in addition to double damages, in age and disability discrimination in employment case).[4]

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[4] The arbitration in this case was conducted in October, 1995, and the award was rendered in January, 1996. *Phelps* was decided on Sept. 8, 1995, before the arbitration in this case took place.

Ordinarily, when we are faced with two conflicting decisions from a state's intermediate appellate courts, such as *Soucek* and *Molenaar*, "this Court must determine what decision the highest court [of the state] would reach if faced with the issue." *Capital Dev. Co. v. Port of Astoria,* 109 F.3d 516, 519 (9th Cir. 1997) (citation omitted). In this case, however, we need not engage in that analysis because the issue before us is not, precisely, what the Minnesota law of punitive damages is, but whether the arbitrators acted in manifest disregard of Minnesota law in awarding punitive damages.

In *Molenaar*, the Minnesota Court of Appeals, citing *Jensen* and *Phelps*, concluded that punitive damages were properly awardable for the intentional disregard of rights not involving personal injury. *Molenaar*, 553 N.W.2d at 427-28. If, under the current state of the law, a Minnesota intermediate appellate court can conclude that punitive damages are available even though no personal injury is involved, we cannot conclude that the arbitrators acted in manifest disregard of Minnesota law in awarding punitive damages.

Barnes has advanced no reason why it would be a manifest injustice to apply Minnesota law, as expounded by

Molenaar, to this appeal.[5] Because Minnesota law permits the award of punitive damages for fraud, the arbitrators' error in referencing California law in awarding punitive damages was harmless.

2. "Adams" Error

Barnes next contends that the award of punitive damages was in manifest disregard of the law, specifically of the requirement of *Adams v. Murakami*, 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348 (1991), that evidence of a defendant's financial condition is a prerequisite to the award of punitive damages, *id.* at 325, 813 P.2d at 1355, and that the plaintiff bore the burden of establishing the defendant's financial condition. *Id.* at 330, 813 P.2d at 1360. *Adams*, however, is a requirement of California law, and we have concluded, above, that this arbitration is governed by Minnesota law. Under Minnesota law, there is no requirement, similar to *Adams*, that a claimant bear the burden of proving the wrongdoer's financial condition.

> Thus, evidence of a defendant's financial condition is an important consideration in determining whether a punitive damages award is excessive,

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[5] Although Barnes mounts a due process challenge to the award of punitive damages, discussed in Part III.A.3, below, it is not based on any asserted lack of fair notice that punitive damages were potentially awardable by the arbitrators. Therefore, we need not decide whether, in the circumstances of this case, there was such a lack of "fair notice," *see BMW of North America v. Gore*, ___ U.S. ___, ___, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996), as would amount to "a manifest injustice."

> but it is not necessarily an essential element to prove entitlement to those damages.

Nugent v. Kerr, 543 N.W.2d 688, 691 (Minn. Ct. App. 1996).[6] Thus, not applying *Adams* was not in manifest disregard of Minnesota law.

For all of these reasons, the arbitrators' award of punitive damages was not in manifest disregard of the law.

3. Due Process

Barnes next makes something akin to a due process argument by contending that the award of punitive damages by arbitrators should be subject to some kind of "heightened scrutiny." However, as the district court recognized, we have "flatly rejected" this argument. In *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991), the appellant argued "that the punitive damage award here violates due process because the award is not subject to the procedural strictures of the courtroom." *Id.* at 1063. We held that a party cannot agree to arbitration,

> and then assert that an award made pursuant to that agreement . . . denies due process because it is not sufficiently reliable. Cunard had every opportunity to present evidence to argue the merits of its position, and to challenge the arbitrator's award in court. Having taken advantage of this process, into which it entered

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[6] The Minnesota rule represents the "majority view." *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996).

> voluntarily, Cunard cannot now argue
> that its due process was denied.

Id. at 1063-64. Thus, Barnes' due process challenge must fail. Moreover, even without engaging in a plenary review of the evidence, it is clear that the punitive damages award against Barnes, which was less than the amount of compensatory damages, was not grossly excessive. *See BMW v. Gore*, ___ U.S. at ___, 116 S. Ct. at 1595.

B. Compensatory Damages

Barnes contends that the arbitrators had "no rational basis" for the amount of compensatory damages they awarded because damages were awarded for the period even after Logan was warned by his accountant "that his investment account included high-risk margin trading and that he could lose everything." Logan's arbitration claim alleged that he learned of Barnes' improprieties on August 1, 1994, whereas he admitted in his testimony that his accountant advised him of the same improprieties in early 1994. Thus, at this point, Barnes contends, Logan was no longer entitled to rely on any asserted misrepresentations by Barnes. Mrs. Logan, however, testified to a different recollection of the meeting with their accountant in early 1994 and the arbitrators could have chosen to believe her version over that of her husband's. Therefore, this is merely a dispute over the assessment of the evidence and we must defer to the arbitrator's findings of fact.

Also, as the district court noted, "the record provides no evidence that the compensatory damages were based on misrepresentation alone. As respondents point out, the panel may have assessed damages based on losses arising out of professional negligence or breaches of fiduciary duty. It is not for this court to speculate, based on the sparse

record and slim arguments, as to the panel's reasoning."[7] We agree.

> Review of arbitration awards is narrow:
>
> We review the Panel's award mindful that confirmation is required even in the face of "erroneous . . . misinterpretations of the law." . . . It is not even enough that the Panel may have failed to understand or apply the law. . . . An arbitrator's decision must be upheld unless it is "completely irrational," or it constitutes a "manifest disregard of law."

Todd Shipyards, 943 F.2d at 1060 (citations omitted). Here, it cannot be said that the amount of compensatory damages awarded is either "completely irrational" or in "manifest disregard of the law." Under the deferential standard of judicial review applicable to arbitrators' awards,

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[7] The Customer Agreement provided: "The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited."

In accordance with that dispensation, the arbitration award contains no factual findings or conclusions of law. It consists of a "Case Summary," which amounts to a summary of the parties' contentions, "Relief Requested," "Other Issues Considered and Decided," and an "Award." It is six pages long, including a title page and a signature page.

the district court did not err in confirming the award of compensatory damages.

IV. SANCTIONS

Logan seeks attorney's fees and double costs under Fed. R. App. P. 38. His reasons are "the lack of support in the law for Barnes' various positions, the defalcations which Barnes committed against them, and the nature of their present circumstances." Two of the three reasons given have nothing to do with the merits of Barnes' appeal, but with his underlying conduct and Logan's "circumstances." These are not reasons to assess sanctions under Rule 38. On the merits, this appeal does not appear to be frivolous or wholly without merit. The Minnesota law of punitive damages was not "clarified" until the pendency of this appeal. The request for Rule 38 sanctions is denied. *See Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984) (imposing sanctions where appeal was "wholly without merit").

The judgment of the district court is **AFFIRMED.**

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT CALIFORNIA

MILTON BARNES,	)	
	)	Nos. C-96-0957 MHP,
Petitioner,	)	C-96-0808 MHP
	)	
vs.	)	**MEMORANDUM AND**
	)	**ORDER**
MARTIN LOGAN;	)	
KOREN LOGAN,	)	May 29, 1996
Trustees for the Logan	)	
Inter Vivos Trust,	)	PATEL, District Judge
	)	
Respondents.	)	
	)	

Milton Barnes petitions this court for an order vacating an arbitration award against him. In a related case, John G. Kinnard and Company, Inc. ("Kinnard") and Scott R. Grady, Kinnard's branch manager in Phoenix, petition the court for an order vacating the same arbitration award. Now before this court are separate motions by Barnes and Kinnard to vacate the arbitration award and cross motions by Martin and Koren Logan, as trustees for the Logan Trust, to confirm the arbitration award. Because the motions in the two cases raise nearly identical issues and involve the same arbitration, the court will consider them together.

Having considered the parties' arguments and submissions, and for the reason set forth below, the court enters the following memorandum and order.

BACKGROUND

As a result of an industrial accident, Martin Logan received a settlement award in 1989 of $1.3 million and began investing that money that same year through Jeff Burrows and Milton Barnes, both of whom were with the brokerage firm of Bateman Eichler, Hill Richards Inc.

According to Barnes and Kinnard, the Logans identified their investment objective as "aggressive income" rather than "conservative income" or "conservative appreciation." The Logans maintain, to the contrary, that Mr. Logan informed Burrows that the funds needed to last him the rest of his life and that he therefore sought a conservative investment strategy.

The Logans followed Burrows and Barnes to PaineWebber in early 1993 and then moved their account to Kinnard when Barnes joined that brokerage firm's Phoenix office later that year. In late 1993 Kinnard and the Logans entered into a customer agreement that included, inter alia, choice of law and arbitration provisions.[1]

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[1] The choice of law provision in the agreement states that "[t]his agreement shall be deemed to have been made in the state of Minnesota and shall be construed, and the rights and liabilities of the parties determined, in accordance with the laws of the State of Minnesota." Decl. of Frank Lewis, Exh. D at ¶ 14.

(continued...)

At this point, the parties' account of the facts diverge remarkably. According to the Logans, Barnes promised them he would "take care of them" according to their investment goals when he took over sole control of the Logan account in 1993. Unbeknownst to them, Barnes was far from trustworthy: his professional history included five complaints, a letter of warning from the Chicago Board Options Exchange and work with seven brokerage firms in nine years. The Logans maintain that the account had a balance of $464,000 when it was opened at Kinnard and that despite sustaining losses of $195,000 over a nine month period, the account still generated roughly $123,000 in commissions for Barnes and Kinnard. During that period, the Logans report that the portfolio went from being diversified between bonds and equities to being eventually concentrated in the stock of a single speculative company. The Logans state that they were sent only one activity letter during this time and were never told of the commissions the account was generating. They add that when they filed

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[1](...continued)

The arbitration provision requires all disputes arising over the account to be submitted to binding arbitration which "shall be conducted pursuant to the Federal Arbitration Act and the laws of the State of Minnesota before a recognized organization which provides an arbitration facility in accordance with the rules obtaining of the selected organization." *Id.* at ¶ 17.

The arbitration disclosures contained in the agreement state that arbitration is final and binding on the parties and that the "arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modifications of rulings by the arbitrators is strictly limited." *Id.* at ¶ 16.

their claim, they were offered $330,000 in reimbursement for market losses and Barnes was asked to resign.

According to Barnes and Kinnard, the Logans were knowledgeable investors who were happy until their high risk strategy failed them. When the Logans moved the account to Kinnard they specifically reiterated their aggressive investment goals. Moreover, the account increased in value and it was not until it began to decline in 1994 that the Logans complained.

On December 9, 1994, the Logans initiated an arbitration action against Barnes, Kinnard and Grady before the National Association of Securities Dealers ("NASD"). After a four-day hearing in October of 1995 the arbitration panel determined that Barnes, Kinnard and Grady were jointly and severally liable for approximately $289,000 in compensatory damages, including interest, and awarded the Logans $500,000 in punitive damages against Kinnard and $250,000 in punitive damages against Barnes.

LEGAL STANDARD

The Federal Arbitration Act allows a district court to vacate the decision of an arbitration panel in five situations. 9 U.S.C. § 10(a)(1)-(5) (Supp. 1996). Relevant to the instant action is the ability of a court to vacate an award "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

This subsection has been interpreted to allow a court to vacate an arbitration award where the arbitrators exceeded their authority by ruling on a matter not submitted to them or acting outside the scope of the contractual agreement,

Michigan Mutual Ins. Co. v. Unigard Security Ins. Co., 44 F.3d 826, 830 (9th Cir. 1995), or where the award evidences a manifest disregard for law. *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1990).[2]

In order to determine that arbitrators did not exceed their authority, courts must ensure that an award is based on the words of the contract and the conduct of the parties. *Michigan Mutual*, 44 F.3d 826, 831 (quoting *Edward Hines Lumber Co. v. Lumber & Sawmill Workers Local No. 2588*, 764 F.2d 631, 635 (9th Cir. 1985); *see also Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 261-62 (9th Cir.1992) (arbitrators exceeded their authority by failing to make findings of fact and conclusions of law as the contract required). However, this inquiry is an extremely limited one. "If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced." This remains so

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[2] Kinnard argues in its reply brief that "manifest disregard of the law" is a separate, non-statutory ground on which to vacate an arbitration award and differs from the requirement under section 10(d) that arbitrators may not exceed their powers. Section 10(d) was redesignated in 1990 as section 10(a)(4) and the court will refer to it as such. Kinnard bases this argument on a footnote in *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195, 1197 n.2 (9th Cir. 1982) and on the structure of the rationale in *Michigan Mutual*, 44 F.3d at 830, 833. Kinnard may be correct, as cases provide differing inquiries in each case, but in the end the distinction is one that does not prove helpful for Kinnard and Barnes. Both grounds appear to emanate from section 10(a)(4), see *Todd Shipyards*, 943 F.2d at 1059-60, and both contemplate an extraordinary deferential posture on the part of the district court with respect to arbitration awards.

even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions. *Sheet Metal Workers Int'l Ass'n, Local No. 359 v. Arizona Mechanical & Stainless, Inc.*, 863 F.2d 647, 653 (9th Cir. 1988) (citations omitted). In other words, a court's conviction that an arbitrator committed serious legal error is not enough to vacate an award where the construction of the contract is arguable. *Id.* (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987)).

Manifest disregard of the law likewise "means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. It must be clear from the record that the arbitrators recognized the applicable law and then ignored it." *Michigan Mutual*, 44 F.3d at 832 (citations omitted); *see also Todd Shipyards*, 943 F.2d at 1060; *Greening v. Stratton Oakmont, Inc.*, 1996 WL 61095, *2 (N.D. Cal. 1996).

Therefore, this court reviews the arbitrators' award cognizant of the repeated admonitions by the Supreme Court and the Ninth Circuit that section 10 is to be interpreted narrowly. *See e.g., First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S. Ct. 1920, 1923 (1995) (when the parties agree that an issue should be resolved by arbitration "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in narrow circumstances"); *Todd Shipyards*, 943 F.2d at 1060.

DISCUSSION

Barnes and Kinnard move to vacate the arbitration award on the grounds that the arbitrators exceeded their authority and evinced a manifest disregard of the law by awarding punitive damages contrary to the choice of law

provision and without evidence of the parties' financial conditions. Barnes adds that the due process clause requires that punitive damage awards be reviewed. Barnes and Kinnard also argue that the arbitrators disregarded the law by awarding compensatory damages for losses sustained after the Logans learned of the alleged wrongdoing.

A. Punitive Damages

1. Scope of Arbitral Authority

First, Barnes and Kinnard argue that the arbitrators were without authority to award punitive damages because the terms of the contract required application of Minnesota law, which they assert does not allow punitive damages where the injuries are solely economic. The Logans not only dispute petitioners' characterization of Minnesota law, but respond that the arbitration provision of the contract allows for punitive damage awards by authorizing application of NASD rules.

Both parties rely on the Supreme Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S. Ct. 1212 (1995) to support their respective positions. In *Mastrobuono*, a case arising from alleged mismanagement of a securities trading account, the Court considered whether an arbitration award of punitive damages was proper under a standard form Client Agreement that contained a New York choice-of-law provision and an arbitration provision compelling arbitration pursuant to NASD rules.[3] *Id.* at 1214-15. Under New

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[3] The client agreement at issue in *Mastrobuono* provided that it would be "governed by the laws of the State of New York" and that disputes or breaches would be (continued...)

York law the "Garrity rule" allows courts but not arbitrators to award punitive damages. *Id.* at 1217. NASD rules, on the other hand, permit arbitrators to consider punitive damages as a remedy. *Id.* at 1218. The Court noted that the agreement nowhere expressly referred to claims for punitive damage, *id.* at 1217, that the choice-of-law provision introduced an ambiguity into the agreement, which otherwise would allow punitive damage awards, and that ambiguities as to the scope of the arbitration clause should be resolved in favor of arbitration. *Id.* at 1218. Applying principles of contract construction the Court then harmonized the conflicting provisions by reading the choice-of-law provision to encompass substantive state law but to exclude state limitations on the authority of arbitrators. *Id.* at 1219. The Court concluded by upholding the arbitration award "as within the scope of the contract." *Id.*

Barnes and Kinnard argue that *Mastrobuono* mandates that any arbitration award must be consistent with the substantive state law governing the arbitration. Because Minnesota law does not limit the power of arbitrators, but merely provides substantive guidance on when punitive damages may be awarded, they maintain that the award in the instant action must comport with that law. They rely on *Gateway Technologies, Inc. v. MCI Communications Corp.*, 64 F.3d 993 (5th Cir. 1995), which vacated an arbitrator's punitive damage award as contrary to the applicable state law. *Id.* at 1001. In *Gateway*, the

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[3](...continued)
"settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc., or the Board of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange Inc." 115 S. Ct. at 1216-17 n.2.

arbitrator of a contract dispute misapplied Virginia substantive law, which only allows for punitive damages predicated on tort liability. *Id.* at 999.

Petitioners' reliance on Gateway is ill-advised in several respects. To begin with, the contract in that case did not contain a choice-of-law provision, *id.* at 998 n.9, thus the court was not concerned with whether the arbitrator acted within the scope of the agreement by awarding punitive damages, but rather whether there was legal error in doing so. The substantive law the arbitrator applied in that case was the law of Virginia, where the arbitrator heard the dispute. *Id.* at 998. This is consistent with the arbitrators' actions in the present case, where they expressly awarded punitive damages pursuant to the law of California, where they heard the dispute, and *Mastrobuono*. Lewis Decl., Exh. A at 5. Furthermore, the inquiry conducted by the Fifth Circuit was fundamentally different from the one this court must conduct. The contract at issue in *Gateway* expressly provided expanded review of the arbitration award for errors of law. *Id.* at 996. Pursuant to that contractual agreement, the court conducted de novo review of the legal issues underlying the arbitration award. *Id.* at 997.

This court's role, in contrast, is not to scrutinize the law the arbitrators applied, but to determine whether their decision was based on a plausible interpretation of the contract and therefore within their authority. *See Sheet Metal Workers*, 863 F.2d at 653. The customer agreement in the present case contained a choice-of-law provision applying Minnesota law to the construction of the agreement as well as an arbitration clause mandating arbitration pursuant to the Federal Arbitration Act and Minnesota law before an organization "in accordance with the rules obtaining of the selected organization." Lewis

Decl., Exh. D at ¶ 17. NASD rules have been interpreted to allow arbitrators to award punitive damages.[4] *Mastrobuono*, 115 S. Ct. at 1218 & n.5; NASD Notice to Members 95-85 (October 1995). Assuming without deciding that Minnesota law comports with petitioners' characterization, the customer agreement is at best ambiguous. In addition, that ambiguity could only have been exacerbated by the fact that in briefing the issue of punitive damages in their answer to the claim, Kinnard and Grady only addressed California law, not once raising the applicability of Minnesota law. Rains Decl., Exh. C at 16-17. As the Supreme Court made clear in *Mastrobuono*, petitioners "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. [The drafting party] drafted an ambiguous document, and they cannot now claim the benefit of the doubt." *Mastrobuono*, 115 S. Ct. at 1219 (citations omitted).

Accordingly, as the arbitrators acted according to an arguable interpretation of the customer agreement, this court will not vacate their award of punitive damages on the grounds that they exceeded their authority.

2. Manifest Disregard of the Law

Barnes and Kinnard also assert that the award of punitive damages was in manifest disregard of the law because the arbitration panel did not hear evidence of petitioners' financial condition as required under the

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[4] Regardless of whether there is a specific NASD rule authorizing arbitrators to award punitive damages, which the parties dispute, the Supreme Court's conclusions on the matter provide adequate authority.

California law which the panel applied. The arbitration award specified that punitive damages were assessed pursuant to Section 3294 of the California Civil Code. Lewis Decl., Exh. A at 5. Petitioners argue that *Adams v. Murakami*, 54 Cal. 3d 105 (1991) holds that a trier of fact may not assess punitive damages against a defendant unless the record contains evidence of the defendant's financial condition.

Petitioners' mischaracterize *Adams*, which does not bar a trier of fact from awarding punitive damages without financial evidence. Rather, *Adams* finds that a "reviewing court cannot make a fully informed determination of whether an award for punitive damages is excessive unless the record contains evidence of the defendant's financial condition." *Id.* at 110. Based on *Adams* a reviewing court may well reverse a punitive damage award where no evidence of financial condition was introduced. But that is not the posture of the instant action. There is no claim that the punitive damages awarded were excessive, only that they were awarded with manifest disregard for the law. However, the panel specifically requested briefing on the issue of punitive damages and the parties each addressed the applicability of *Adams*. Lewis Decl., Exhs. E & F. Moreover, the Logans argued in their brief that even if *Adams* controlled, there was already sufficient evidence of respondents' financial condition in the record.

Nothing in the record before this court suggests that the arbitration panel recognized that *Adams* represented the applicable law and then chose to ignore it. The very fact that the panel requested briefing on punitive damages suggests otherwise -- that they considered the law presented to them. The arbitrators had before them all the potentially applicable law as well as some evidence of net worth. There is nothing to indicate that once armed with this

information, the arbitrators then ignored it. At the most, they got it wrong, and legal error alone would not merit overturning the award.[5] Accordingly, the punitive damages awarded against petitioners do not evidence a manifest disegard for the law.

3. Due Process

Finally, Barnes alone argues that the punitive damage award against him, made without evidence of his net worth and without judicial review, violates Due Process. This court agrees with the district court's assessment in *Greening* that that argument was "flatly rejected" by the Ninth Circuit in *Todd Shipyards*. *Greening*, 1996 WL 61095, *5. There the court noted that the party seeking to vacate the arbitration award had entered into a binding arbitration voluntarily and that it "cannot agree to arbitrate 'all disputes' and then assert that an award made pursuant to that agreement, unless faulty for some reason, denies due process because it is not sufficiently reliable." *Todd Shipyards*, 943 F.2d at 1063-64. Barnes entered into the arbitration agreement fully aware of the nature of the proceedings involved and the limited judicial review it

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[5] With respect to legal error, the relative lack of legal expertise on the part of the arbitrators is something petitioners should have anticipated. Brokerage firms favored the binding arbitration policy knowing full well that the arbitration panels would consist primarily of industry representatives rather than lawyers.

afforded;[6] pursuant to that review, this court has not found the arbitration award faulty nor violative of Due Process.

B. Compensatory Damages

Barnes and Kinnard contend that the arbitrators' award of compensatory damages was in manifest disregard of the law because the award compensated for losses that occurred after the Logans learned of any improprieties in the management of their account. Relying on cases brought under Rule 10b-5 of the Securities Exchange Act of 1934 which hold that it is error to award damages for losses occurring after investors were influenced by misrepresentations, see *Nye v. Blyth Eastman Dillon & Co., Inc.*, 588 F.2d 1189, 1198 (8th Cir. 1978), petitioners point to admissions by Martin Logan that his accountant warned him in early 1994 of mismanagement and alerted him that he could lose everything. Because the account was still profitable at this time, petitioners claim the compensatory damages are in manifest disregard of the law.

Even assuming *Nye* to be the applicable law, the claim brought by the Logans before NASD was based on more than fraud, Lewis Decl., Exh. B, and the record provides no evidence that the compensatory damages were based on

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[6] The arbitration disclosures in the customer agreement state:

Arbitration is final and binding on the parties. The parties are waiving their right to seek remedies in court, including the right to jury trial. . . . The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited. Lewis Decl., Exh. D at ¶ 16.

misrepresentation alone. As respondents point out, the panel may have assessed damages based on losses arising out of professional negligence or breaches of fiduciary duty. It is not for this court to speculate, based on a skeletal record and slim arguments,[7] as to the panel's reasoning. Rather, it is enough that there is no indication that the arbitrators recognized the law petitioners cite as applicable and then chose to ignore it.

Accordingly, the arbitration award of compensatory damages was not in manifest disregard of the law and shall not be vacated.

For the foregoing reasons, IT IS HEREBY ORDERED that petitioners' motion to vacate the arbitration award is DENIED; and respondent's motion to confirm the arbitration award is GRANTED.

IT IS SO ORDERED.

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[7] The scant record of the proceedings is in accord with the customer agreement, which specifies that an arbitration award need not include factual findings or legal reasoning. Lewis Decl., Exh. D at ¶ 16.

APPENDIX D

APPENDIX D

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimants

Martin Logan and Koren Logan, Trustees
for the Logan Inter Vivos Trust

NASD Arbitration
No. 94-05214

Name of Respondents

John G. Kinnard & Company, Inc.
Milton Barnes
Scott Grady

REPRESENTATION

For Claimants: David S. Markun, Esq., Zelle & Larson, San Francisco, California

For Respondents John G. Kinnard & Company, Inc. and Scott Grady: F. Chet Taylor, Esq., John G. Kinnard & Company, Inc., Minneapolis, Minnesota

For Respondent Milton Barnes: Frank Lewis, Esq., Begam Lewis Marks & Wolfe, Phoenix, Arizona

CASE INFORMATION

Statement of Claim filed: December 9, 1994

Claimants' Submission Agreement signed: January 5, 1995

Statement of Answer, Cross-Claim, and Third-Party Claim of Respondents John G. Kinnard & Company, Inc. and Scott Grady filed: March 16, 1995

Statement of Answer filed by Respondent Milton Barnes: March 1, 1995

Respondents' Submission Agreements signed as follows:

John G. Kinnard & Company, Inc.:
March 16, 1995 and June 12, 1995
Scott Grady: June 14, 1995
Milton Barnes: February 28, 1995

HEARING INFORMATION

Pre-Hearing Conference Date(s)/Session(s):
September 14, 1995 (one session)
September 18, 1995 (one session)

Hearing Date(s)/Session(s):
October 17, 1995 (two sessions)
October 18, 1995 (two sessions)
October 19, 1995 (two sessions)
October 20, 1995 (two sessions)

Hearing Location: San Francisco, California

CASE SUMMARY

Claimants Martin Logan and Koren Logan, trustees for the Logan Revocable Inter Vivos Trust, alleged that they were not knowledgeable in the area of securities investments and that they advised Respondents that they had little knowledge or experience regarding investments and that they needed the assistance of a good and conservative investment counselor to invest their assets in a prudent and conservative manner. Claimants further alleged the following causes of action with respect to their investments in various securities: 1) Fraud and Deceit based on Omission of Material Facts; 2) Professional Negligence; 3) The "Know Your Securities" Rule; 4) Breach of Fiduciary Duty; 5) Intentional Misrepresentation; 6) Negligent Misrepresentation; 7) John G. Kinnard & Company's Failure to Supervise; 8) Agency; and 9) Dependent Adult/Fiduciary Abuse.

Respondents John G. Kinnard & Company, Inc. (Kinnard) and Scott Grady denied Claimants' allegations of wrongdoing. Kinnard and Grady alleged that the above-captioned dispute represents a classic example of investors who fully understood the risks involved in their aggressive investment strategy, and were content to assume those risks as long as their account was profitable; then, the tables turned, and the same risks that led to significant profits caused the Logans to sustain significant losses; when that happened, the Logans were magically transformed into conservative investors, looking only for safe, secure investments; and that the Logans' conduct both before coming to Kinnard and while at Kinnard, and the documentary evidence in this matter contradict the Logans' current claims of naivete. Kinnard and Grady further alleged that: 1) The Logans cannot satisfy any of the elements of a churning claim; 2) The Logans cannot state

a claim for unsuitability; 3) The Logans authorized every trade in their account; 4) The Logans' common law claims against Kinnard and Grady must be denied; 5) The Logans suffered no losses that can be attributed to Kinnard or Grady; 6) The Logans' "control person" theory must fail because Kinnard and Grady acted in good faith at all times; and 7) The Logans are not entitled to punitive damages from Kinnard or Grady.

In their Cross-Claim, Kinnard and Grady alleged that although they believe that the Logans' account was handled in accordance with the Logans' instructions, if the arbitration panel determines otherwise, then any misconduct was solely on the part of Barnes; and that under those circumstances, Kinnard and Grady would be entitled to complete indemnification from Barnes for any and all damages assessed against Kinnard or Grady.

Respondent Milton Barnes denied any liability to Claimants and denied Claimants' allegations of wrongdoing. Respondent Barnes alleged that: 1) all of the trading done in Claimants' account at Kinnard was done with the knowledge and consent of the Claimants; 2) the trading was done in an effort to reach the stated goals of Claimants; 3) Claimants were advised of and consented to the speculative and aggressive nature of the trading in their account; (4) Claimants were advised that the level of withdrawals they sought to and actually made from the account, could not be covered by conservative investing; and 5) Claimants were aware, as a result of conversations with Barnes, confirmations and monthly statements from Kinnard, and acknowledgements signed by Claimants, that their account was active, very volatile and was of necessity engaging in aggressive trading. Respondent Barnes further alleged that it is unfortunate that Claimants' account had market losses and alleged that in view of the background of

the agreed to aggressive trading in the account and the fact that Claimants understood and approved the trading strategies in the subject account, Barnes is not, and should not be held responsible for any of the losses.

RELIEF REQUESTED

Claimants requested:

1. Compensatory damages in an amount of not less than $750,000.00 and according to proof at the time of hearing;

2. Loss of future profits to be determined at hearing;

3. Pre-judgment and post-judgment interest at the highest legal rate;

4. Punitive damages in the amount of $3,000,000.00;

5. All costs of suit including attorneys an consulting fees under Welfare and Institutions Code Section 15600, et seq.;

6. Treble damages pursuant to Civil Code Section 3345; and

7. Such further relief as the arbitration panel deems just and proper.

Respondents Kinnard and Grady requested that the Logans' Statement of Claim be dismissed in its entirety, with the Logans recovering nothing from Kinnard and Grady.

Respondent Barnes requested dismissal of Claimants' claims.

OTHER ISSUES CONSIDERED AND DECIDED

On or about July 10, 1995, the panel of arbitrators was advised of Third-Party Respondent Jeffrey Burrows' bankruptcy filing and that the above-captioned matter was stayed with respect to Jeffrey Burrows.

On or about August 31, 1995, the panel of arbitrators was advised that John G. Kinnard & Company, Inc. and Scott Grady dismissed their third-party claims against Kemper Securities, Inc. and Jeffrey Burrows voluntarily and without prejudice; and that John G. Kinnard & Company, Inc. and Scott Grady dismissed their third-party clams against PaineWebber Incorporated with prejudice.

The parties have agreed that the Award in this matter may be executed in either counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the National Association of Securities Dealers, Inc. (NASD).

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing and post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents John G. Kinnard & Company, Inc.'s and Scott Grady's Motion to Exclude Post-Hearing Evidence is granted.

2. Respondents John G. Kinnard & Company, Inc., Scott Grady and Milton Barnes are jointly and severally liable for and shall pay to Claimants the sum of $261,561.00 in compensatory damages.

3. Respondents John G. Kinnard & Company, Inc., Scott Grady and Milton Barnes are jointly and severally liable for and shall pay to Claimants the sum of $27,463.00 in interest.

4. Respondent John G. Kinnard & Company, Inc. is solely liable for and shall pay to Claimants the sum of $500,000.00 in punitive damages pursuant to Section 3294 of the California Civil Code and pursuant to Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

5. Respondent Milton Barnes is solely liable for and shall pay to Claimants the sum of $250,000.00 in punitive damages pursuant to Section 3294 of the California Civil Code and pursuant to Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

6. All claims with respect to the Cross-Claim of John G. Kinnard & Company, Inc. and Scott Grady against Milton Barnes are dismissed.

7. The parties shall each bear their respective costs including attorney's fees.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall refund the $750.00 hearing session deposit previously deposited by the Claimants and shall retain the $1,250.00 hearing session deposit previously deposited by John G. Kinnard & Company, Inc. Forum fees are assessed against Respondents John G. Kinnard & Company, Inc., Scott Grady and Milton Barnes, jointly and severally, in the amount of $7,350.00, calculated as follows: Two pre-hearing sessions times $300.00/session plus eight hearing sessions times $1,000.00/session minus the $1,250.00 retained by the NASD.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATORS

Name	Public/Industry
Walter P. Hitchcock, Esq.	Public Arbitrator
Amy Seltzer, Ph.D.	Public Arbitrator
Thomas W. Borden	Industry Arbitrator

Concurring Arbitrators' Signatures

/s/

Walter P. Hitchcock, Esq.

Amy Seltzer, Ph.D.

Thomas W. Borden

Date of Decision: 1/4/96

Date Served: 01/30/96

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall refund the $750.00 hearing session deposit previously deposited by the Claimants and shall retain the $1,250.00 hearing session deposit previously deposited by John G. Kinnard & Company, Inc. Forum fees are assessed against Respondents John G. Kinnard & Company, Inc., Scott Grady and Milton Barnes, jointly and severally, in the amount of $7,350.00, calculated as follows: Two pre-hearing sessions times $300.00/session plus eight hearing sessions times $1,000.00/session minus the $1,250.00 retained by the NASD.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATORS

Name	Public/ Industry
Walter P. Hitchcock, Esq.	Public Arbitrator
Amy Seltzer, Ph.D.	Public Arbitrator
Thomas W. Borden	Industry Arbitrator

Concurring Arbitrators' Signatures

Walter P. Hitchcock, Esq.

/s/

Amy Seltzer, Ph.D.

Thomas W. Borden

Date of Decision: 1/25/96
Date Served: 01/30/96

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall refund the $750.00 hearing session deposit previously deposited by the Claimants and shall retain the $1,250.00 hearing session deposit previously deposited by John G. Kinnard & Company, Inc. Forum fees are assessed against Respondents John G. Kinnard & Company, Inc., Scott Grady and Milton Barnes, jointly and severally, in the amount of $7,350.00, calculated as follows: Two pre-hearing sessions times $300.00/session plus eight hearing sessions times $1,000.00/session minus the $1,250.00 retained by the NASD.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATORS

Name	Public/Industry
Walter P. Hitchcock, Esq.	Public Arbitrator
Amy Seltzer, Ph.D.	Public Arbitrator
Thomas W. Borden	Industry Arbitrator

Concurring Arbitrator's Signatures

_____

Walter P. Hitchcock, Esq.

_____

Amy Seltzer, Ph.D.

/s/

Thomas W. Borden

Date of Decision: _____

Date Served: 01/30/96

APPENDIX E

NASD Regulation, Inc.
Office of Dispute Resolution
525 Market Street, Suite 300
San Francisco, CA 94105-2711 415-882-1234 Fax 415-546-6990
Satellite Office at: 300 South Grand Avenue, Suite 1620,
Los Angeles, CA 90071-3109 Fax 213-613-2677

Via Certified and Regular Mail

October 8, 1997

Milton Barnes
4437 E. Arlington Road
Phoenix, AZ 85018

Subject: NASD Arbitration Number 94-05214
Martin Logan, et al. vs. Milton Barnes, et al.

Dear Mr. Barnes:

On January 30, 1996 an award was issued in the above entitled action which ordered you to pay Claimants compensatory damages and pay Claimants $250,000.00 in punitive damages. NASD Regulation, Inc. has been advised that you have not complied with this order. I have enclosed David Markun's letter of September 18, 1997 for your review.

Article VI, Section 3 of the NASD By-Laws, permits the NASD to institute cancellation proceedings against any member or associated person that fails to pay an arbitration award rendered by an NASD panel. Therefore, pursuant to Article VI, Section 2 of the NASD Code of Procedure, your registration with the Association will be canceled on the

date described below unless you provide the undersigned prior to that date with documentation that:

(1) full payment of the award was made;

(2) the claimant has agreed to installment payments or has otherwise settled this matter;

(3) you have filed a timely motion to vacate or modify the award, which has not been denied; or

(4) you have filed a petition in bankruptcy pursuant to the Federal Bankruptcy Code and the bankruptcy proceeding is pending or the award has been discharged by the Bankruptcy Court.

If you are unable to document any of the four factors described above, the cancellation of your registration with the NASD will become effective on October 31, 1997. Article VI, Section 2 of the NASD Code of Procedure, which governs revocation procedures, entitles you to a hearing if you so request before this action becomes final.

Any request for a hearing must be in writing and be received by the undersigned on or before October 31, 1997. It must clearly state your reasons for failing to pay the award which are limited to only the four areas discussed above. We are not aware of any other lawful justification for failing to pay their award other than the four reasons explained above. NO ASPECT OF THE ARBITRATION PROCEEDING OR THE AWARD WILL BE SUBJECT TO REVIEW OR CONSIDERATION DURING ANY

SUCH HEARING ON THE PROPOSED CANCELLATION.

If you have any questions concerning any aspect of this letter or other details of the cancellation of your registration with the NASD, please call me. We are providing a copy of this letter to Claimant's counsel in the arbitration proceeding (and to your current employer, if applicable).

Very truly yours,

/s/

Derek L. Sorrells
Senior Arbitration Administrator
SF/415-882-1234

DLS:DLS:LS00A
Enclosure

cc: David Markun, Esq.
Frank Lewis, Esq.

Capital West Investment Group, Inc.
2525 E. Camelback Road
Suite 510
Phoenix, AZ 85016

APPENDIX F

Complaint No. C3A960030
Complainant's Exhibit No. 1
No. of Pages in Exhibit 11

NASD REGULATION, INC.

DISTRICT BUSINESS CONDUCT COMMITTEE

FOR DISTRICT NO. 3

In the Matter of	:
	:
District Business Conduct Committee	:
For District No. 3,	:
Complainant	: STATEMENT OF
	: COMPLAINT
vs.	:
	:
Milton R. Barnes III, Registered	: COMPLAINT
Principal	: NO. C3A960030
4437 E. Arlington Road	:
Phoenix, Arizona 85018	: DATE:
(CRD No. 1427439)	: AUGUST 2, 1996
	:
Scott R. Grady, Registered Principal	:
4700 E. Marston Drive	:
Paradise Valley, Arizona 85251	:
(CRD No. 1000078)	:
	:
Barry L. Seale, Registered Principal	:
2129 Beam Avenue	:
Maplewood, Minnesota 55109	:
(CRD No. 1416107)	:
	:

and	:
	:
John G. Kinnard and Company, Inc.,	:
Member	:
920 - 2nd Avenue South	:
Minneapolis, Minnesota 55402-2342	:
(CRD No. 466)	:
	:
Respondents	:
	:

Upon information and belief, the District Business Conduct Committee for District No. 3 alleges that:

JURISDICTION

1. During all periods relevant to the allegations of this Complaint:

(a) Respondent Milton W. Barnes III ("Barnes") was associated with NASD member John G. Kinnard and Company, Inc. ("Kinnard" or the "firm") as a registered representative and principal in the firm's Phoenix, Arizona branch office. He is presently associated with another NASD member; therefore, NASD Regulation, Inc. has jurisdiction to issue this Complaint;

(b) Respondent Scott R. Grady ("Grady") was associated with Kinnard as a registered principal and branch manager of the Phoenix branch office. As he is presently associated with another member of the NASD, NASD Regulation, Inc. has jurisdiction to issue this Complaint;

(c) Respondent Barry L. Seale ("Seale") was associated with Kinnard in a compliance position in the firm's main office in Minneapolis, Minnesota. As he is still

associated with the firm, NASD Regulation, Inc. has jurisdiction to issue this Complaint; and

(d) Respondent Kinnard was a member of the NASD and, as the firm's membership is current, NASD Regulation, Inc. has jurisdiction to issue this Complaint.

CAUSE ONE OF COMPLAINT

Excessive Trading

2. During the period from approximately November 23, 1993 through approximately August 18, 1994, respondent Barnes recommended to and effected for customers Martin and Koren Logan (the "Logans") a series of transactions in their account at Kinnard that were excessive in number given the customers' financial situation and needs, as set forth on Schedule A hereto and incorporated herein by this reference.

3. Recommending and effecting a series of transactions that are excessive in number, as described in paragraph 2 above, constitutes the following violations by Barnes:

(a) a series of recommendations without a reasonable basis for believing such recommendations to be suitable for the Logans, in violation of Conduct Rule 2310 (f/k/a Article III, Section 2 of the NASD Rules of Fair Practice ("Rules"); and

(b) conduct inconsistent with high standards of commercial honor and just and equitable principle of trade, in violation of Conduct Rule 2110 (f/k/a Article III, Section 1 of the Rules).

CAUSE TWO OF COMPLAINT

Unsuitable Recommendations

4. During the period from approximately December 14, 1993 through approximately July 15, 1994, respondent Barnes recommended and effected a series of transactions in

the Logan's account at Kinnard that were unsuitable for them in light of their financial situation and needs, in that:

(a) Barnes recommended and purchased Monterey Pasta in a series of transactions that began on or about December 14, 1993 and ended on or about February 9, 1994 that resulted in the acquisition of approximately 46,500 shares at a total cost of $633,997, which recommendations and transactions were unsuitable because the security was more speculative than was suitable for the Logans and the transactions caused the account to be excessively and unsuitably concentrated in Monterey Pasta;

(b) Barnes recommended and purchased Digital Biometrics in a series of transactions that began on or about January 24, 1994 and ended on or about March 25, 1994 that resulted in the acquisition of approximately 24,000 shares at a total cost of $306,712.80, which recommendations and transactions were unsuitable because the security was more speculative than was suitable for the Logans and the number of shares acquired was excessive in size;

(c) the recommendations that resulted in the transactions set forth on Schedule A, attached hereto and previously incorporated herein, were unsuitable because they caused a change in the nature of the investments held in that account from approximately 50% municipal securities and 50% equity securities at year-end 1993 to 0% municipal securities and 100% equity securities by month-end May 1994; and

(d) the recommendations that resulted in the transactions on Schedule A, attached hereto and previously incorporated herein, were unsuitable because they caused the Logan's margin debt to increase to an unsuitable level,

in that margin debt increased from 47% of the value of the positions in the account at year-end 1993 to 62% of the value of the positions in the account at April month-end, 65% at May month-end and 70% at June month-end.

5. Recommending and effecting transactions that were unsuitable for the Logans in view of their financial situation and needs, as described on paragraphs 4(a) through 4(d) above, constitutes a violation of Conduct Rule 2310 (f/k/a Article III, Section 2 of the Rules) by Barnes and, further, constitutes conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 (f/k/a Article III, Section 1 of the Rules) by Barnes.

CAUSE THREE OF COMPLAINT

Attempt to Settle Customer Complaint Without Firm's Authorization

6. In August 1994, acting personally by telephone on or about August 8, 1994 and acting through counsel by letter on or about August 10, 1994, respondent Barnes offered a monetary settlement to the Logans in the approximate amount of $300,00.00 as compensation for a portion of the losses incurred in their account during 1994, which offer was made without the knowledge or authorization of Kinnard.

7. Offering to compensate the Logans for losses incurred in their account without the knowledge or consent of Kinnard, as described in paragraph 6 above, constitutes conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 (f/k/a Article III, Section 1 of the Rules) by Barnes.

CAUSE FOUR OF COMPLAINT

Supervision

8. During the period from approximately January 1, 1994 through approximately July 15, 1994, respondent Kinnard, acting through respondents Grady and Seale, failed to supervise respondent Barnes in a manner reasonably designed to achieve compliance with the NASD Rules pertaining to excessive trading and suitability of recommendations, in that they permitted Barnes to engage in the conduct described above in Causes One and Two of Complaint.

9. The failure to supervise in a manner reasonabl[y] designed to achieve compliance with applicable rules, as described n paragraph 8 above, constitutes a violation of Conduct Rule 3010 (f/k/a Article III, Section 27 of the Rules) by respondents Kinnard, Grady and Seale and, further, constitutes conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 (f/k/a Article III, Section 1 of the Rules) by respondents Kinnard, Grady and Seale.

The foregoing is true and correct to the best of our knowledge and belief.

FOR THE DISTRICT BUSINESS
CONDUCT COMMITTEE
FOR DISTRICT NO. 3, BY
/s/

_____

FRANK J. BIRGFELD
DISTRICT DIRECTOR/
VICE PRESIDENT

Complaint No. C3A960030
Schedule A
Excessive Trading

Date	Description/Security	Shares	B/S
11/29/93	Pacific Western Bancshares	10,000	B
11/30/93	Check Withdrawal		
12/01/93	Fuel - Tech	2,000	B
12/01/93	Fuel - Tech	3,000	B
12/01/93	Intel Corp - CALL	5	B
12/10/93	Fuel - Tech	(6,100)	S
12/10/93	Pacific Western Bancshares	(7,200)	S
12/14/93	Monterey Pasta	5,000	B
12/15/93	Interest - Alameda Cnty Cal		
12/16/93	Vons Cos Inc	(25,000)	S
12/20/93	Intel Corp - CALL	10	B
12/21/93	Margin Interest (11/21 to 12/20		
12/23/93	Intel Corp - CALL	(10)	S
12/27/93	Fuel - Tech	3,000	B
12/27/93	Intel Corp	(500)	S
12/27/93	Monterey Pasta	3,000	B
12/30/93	Monterey Pasta	1,000	B

Date	Description/Security	Shares	B/S
12/30/93	Pacific Western Bancshares	1,200	B
12/31/93	Margin Debit (12/21 to 12/31)		
01/04/94	Wire		
01/06/94	Alpine Group Inc	(3,000)	S
01/06/94	Marcum Natural Gas	(2,000)	S
01/06/94	Monterey Pasta	2,000	B
01/11/94	BMC Software Inc	(500)	S
01/11/94	Infrasonics Inc	(3,000)	S
01/11/94	Monterey Pasta	6,500	B
01/12/94	Monterey Pasta	3,500	B
01/12/94	San Francisco Calif	(100,000)	S
01/14/94	Fuel - Tech	(3,000)	S
01/14/94	Monterey Pasta	5,000	B
01/14/94	Sierra Tucson Companies	(2,000)	S
01/18/94	Alameda Cnty Calif CTF	(100,000)	S
01/18/94	California State Franc	(100,000)	S
01/18/94	Local Govt Fin Auth Ca	(30,000)	S

Date	Description/Security	Shares	B/S
01/18/94	Puerto Rico Commonwealth	250,000	B
01/20/94	Fuel - Tech	(2,000)	S
01/20/94	Monterey Pasta	3,000	B
01/20/94	Check Withdrawal		
01/21/94	Alpine Group	(1,000)	S
01/21/94	BMC Software	(500)	S
01/21/94	Margin Interest		
01/24/94	Digital Biometrics Inc	5,000	B
01/24/94	Local Govt Fin Auth Ca	(25,000)	S
01/25/94	Digital Biometrics Inc	3,000	B
01/26/94	Alpine Group Inc	(1,000)	S
01/26/94	Marcum Natural Gas	(1,000)	S
01/26/94	Monterey Pasta	3,000	B
01/26/94	Pacific Western Bancshares	(2,000)	S
01/27/94	Infrasonics Inc	(2,000)	S
01/27/94	Sierra Tucson Companies	(1,000)	S
02/01/94	Wire		
02/02/94	Monterey Pasta	4,000	B

Date	Description/Security	Shares	B/S
02/02/94	Pacific Western Bancshares	(2,000)	S
02/02/94	Sierra Tucson Companies	(1,200)	S
02/02/94	Tokos Medical Corp	(2,000)	S
02/04/94	US Bancorp - CALL - (Apr 30)	20	B
02/04/94	US Bancorp - CALL - (Apr 25)	20	B
02/04/94	Monterey Pasta	4,000	B
02/08/94	US Bancorp - CALL - (Apr 25)	(20)	S
02/08/94	Monterey Pasta	4,500	B
02/09/94	Fuel - Tech	(2,000)	S
02/09/94	Monterey Pasta	2,000	B
02/10/94	Fuel - Tech	(2,000)	S
02/10/94	Amfed Financial Inc	3,000	B
02/10/94	US Bancorp - CALL - (Apr 30)	(20)	S
02/11/94	Wire Funds to Great Western Savings		
02/11/94	Wire Fee		
02/18/94	Amfed Financial Inc	2,000	B
02/18/94	Monterey Pasta	(3,000)	S

Date	Description/Security	Shares	B/S
02/22/94	Monterey Pasta	(2,000)	S
02/22/94	Margin Interest		
02/23/94	Digital Biometrics Inc	3,000	B
02/23/94	Monterey Pasta	(3,000)	S
02/24/94	Amfed Financial Inc	2,000	B
02/24/94	Monterey Pasta	(2,000)	S
02/25/94	Digital Biometrics Inc	6,000	B
02/25/94	Monterey Pasta	(4,500)	S
03/02/94	Wire Funds to Great Western Savings		
03/02/94	Wire Fee		
03/04/94	Monterey Pasta	2,000	B
03/08/94	Monterey Pasta	(2,000)	S
03/17/94	Monterey Pasta	1,500	B
03/21/94	Margin Interest		
03/22/94	Monterey Pasta	(4,500)	S
03/23/94	Amfed Financial Inc	4,000	B
03/23/94	Digital Biometrics Inc	6,000	B
03/23/94	Monterey Pasta	(1,000)	S
03/23/94	Monterey Pasta	(5,000)	S
03/23/94	WTD Industries Inc	2,000	B

Date	Description/Security	Shares	B/S
03/24/94	Monterey Pasta	(2,500)	S
03/25/94	Amfed Financial Inc	7,000	B
03/25/94	Telefonos Mex - CALL (Apr)	10	B
03/25/94	Telefonos Mex - CALL (Apr)	10	B
03/25/94	Digital Biometrics Inc	1,000	B
03/25/94	Monterey Pasta	(9,500)	S
03/25/94	Puerto Rico Commonwealth	(100,000)	S
03/25/94	WTD Industries Inc	2,500	B
03/28/94	Telefonos Mex - CALL (Apr 60)	(20)	S
03/29/94	WTD Industries Inc	10,000	B
03/31/94	WTD Industries Inc	(5,000)	S
04/04/94	WTD Industries Inc	5,000	B
04/04/94	Wire Funds to Great Western Savings		
04/04/94	Wire Fee		
04/06/94	Amfed Financial Inc	(1,000)	S
04/07/94	Amfed Financial Inc	(3,000)	S
04/21/94	Margin Interest		

Date	Description/Security	Shares	B/S
04/26/94	Amfed Financial Inc	(2,000)	S
04/27/94	Amfed Financial Inc	(2,000)	S
04/27/94	Digital Biometrics Inc	(2,000)	S
04/29/94	Dividend - Amfed Financial Inc		
04/29/94	Wire Funds to Great Western Savings		
05/12/94	Puerto Rico Commonwealth	(100,000)	S
05/17/94	WTD Industries Inc	(10,000)	S
05/19/94	Puerto Rico Commonwealth	(50,000)	S
05/23/94	Margin Interest		
05/26/94	Amfed Financial Inc	(5,000)	S
05/26/94	Digital Biometrics Inc	(5,000)	S
05/26/94	Monterey Pasta	16,500	B
05/27/94	Amfed Financial Inc	(3,000)	S
05/27/94	Monterey Pasta	4,000	B
05/27/94	Wire Funds to Great Western Savings		
05/27/94	Wire Fee		

Date	Description/Security	Shares	B/S
05/31/94	Monterey Pasta	(3,000)	S
06/01/94	WTD Industries Inc	(4,500)	S
06/08/94	Amfed Financial Inc	(2,000)	S
06/17/94	Digital Biometrics Inc	(17,000)	S
06/21/94	Margin Interest		
06/23/94	Monterey Pasta	3,000	B
06/24/94	Employee Solutions	7,000	B
07/01/94	Wire Funds to Great Western Savings		
07/01/94	Wire Fee		
07/01/94	Employee Solutions Inc	(4,000)	S
07/06/94	Employee Solutions Inc	(3,000)	S
07/07/94	Monterey Pasta	(6,500)	S
07/08/94	Monterey Pasta	(1,000)	S
07/18/94	Monterey Pasta	(1,000)	S
07/19/94	Monterey Pasta	(2,000)	S
07/21/94	Margin Interest		
07/22/94	Monterey Pasta	(1,000)	S

I, the undersigned Cindy A. Vigil, hereby certify that on August 2, 1996 I have caused a copy of the Notice of Complaint in Complaint No. C3A960030 to be placed in the United States mail, Certified and First Class postage prepaid, addressed to the following persons:

Milton R. Barnes III
4437 E. Arlington Road
Phoenix, AZ 85018

Scott R. Grady
4700 E. Marston Drive
Paradise Valley, AZ 85251

Barry L. Seale
2129 Beam Avenue
Maplewood, Minnesota 55109

John G. Kinnard and Company, Inc.
920 2nd Ave. South
Minneapolis, Minnesota 55402-2342

/s/

Cindy A. Vigil

APPENDIX G

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

15 U.S.C. §§ 78s(b)(2) and 78s(c)

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

(b) Proposed rule changes; notice; proceedings.

(2) Within thirty-five days of the date of publication of notice of the filing of a proposed rule change in accordance with paragraph (1) of this subsection, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall -- (A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within one hundred eighty days of the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(c) Amendment by Commission of rules of self-regulatory organizations.

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization,

or otherwise in furtherance of the purposes of this title, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking. (2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation. (3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking. (4) (A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of title 5, United States Code [5 USCS § 553], for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this title

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this title to be part of the rules of such self-regulatory organization

and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5), the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

NASD Manual

10000. CODE OF ARBITRATION PROCEDURE

10301. Required Submission

(a) Any dispute, claim, or controversy eligible for submission under the Rule 10100 Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer.

(b) Under this Code, the Director of Arbitration, upon approval of the Executive Committee of the National Arbitration Committee, or the National Arbitration Committee, shall have the right to decline the use of its arbitration facilities in any dispute, claim, or controversy, where, having due regard for the purposes of the Association and the intent of this Code, such dispute, claim, or controversy is not a proper subject matter for arbitration.

(c) Claims which arise out of transactions in a readily identifiable market may, with the consent of the Claimant,

be referred to the arbitration forum for that market by the Association.

(d) Class Action Claims

(1) A claim submitted as a class action shall not be eligible for arbitration under this Code at the Association.

(2) Any claim filed by a member or members of a putative or certified class action is also ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court, or is ordered by a court to an arbitral forum not sponsored by a self-regulatory organization for classwide arbitration. However, such claims shall be eligible for arbitration in accordance with paragraph (a) or pursuant to the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.

Disputes concerning whether a particular claim is encompassed by a putative or certified class action shall be referred by the Director of Arbitration to a panel of arbitrators in accordance with Rule 10302 or Rule 10308, as applicable. Either party may elect instead to petition the court with jurisdiction over the putative or certified class action to resolve such disputes. Any such petition to the court must be filed within ten business days of receipt of notice that the Director of Arbitration is referring the dispute to a panel of arbitrators.

(3) No member or associated person shall seek to enforce any agreement to arbitrate against a customer, other member or person associated with a member who has

initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the class action unless and until: (A) the class certification is denied; (B) the class is decertified; (C) the customer, other member or person associated with a member is excluded from the class by the court; or (D) the customer, other member or person associated with a member elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.

(4) No member or associated person shall be deemed to have waived any of its rights under this Code or under any agreement to arbitrate to which it is party except to the extent stated in this paragraph.

NASD Manual

10000. CODE OF ARBITRATION PROCEDURE

10300. UNIFORM CODE OF ARBITRATION

10314. Initiation of Proceedings

Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration an executed Submission Agreement, a Statement of Claim of the controversy in dispute, together with the documents in support of the Claim, and the required deposit. Sufficient additional copies of the Submission Agreement and the Statement of Claim and supporting documents shall

be provided to the Director of Arbitration for each party and each arbitrator. The Statement of Claim shall specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) Answer -- Defenses, Counterclaims, and/or Cross-Claims

(1) Within twenty (20) business days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of the Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees. The Answer shall specify all available defenses and relevant facts thereto that will be relied upon at the hearing and may set forth any related Counterclaim the Respondent(s) may have against the Claimant, any Cross-Claim the Respondent(s) may have against any other named Respondent(s), and any Third-Party Claim against any other party or person based upon any existing dispute, claim, or controversy subject to arbitration under this Code.

(2) (A) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who pleads only a general denial as an Answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(B) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to

specify all available defenses and relevant facts in such party's answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting such facts or defenses not included in such party's Answer at the hearing.

15 U.S.C. § 78o-3

§ 78o-3. Registered securities associations

(b) Determinations by Commission requisite to registration of applicant as national securities association. An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that --

(8) The rules of the association are in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.

NASD Manual

9370. Application to Commission for Review

(a) Appeal to Commission; Effect

A Respondent aggrieved by final disciplinary action pursuant to the Rule 9200 Series or the Rule 9300 Series may apply for review by the Commission pursuant to Section 19(d)(2) of the Act. The filing with the

Commission of an application for review by the Commission shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1).

(b) Association Notification to Member

The Association shall promptly notify any Association member with which a Respondent is associated if the Respondent files an application for review to the Commission.

15 U.S.C. § 78y

§ 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence.

(1) A person aggrieved by a final order of the Commission entered pursuant to this title may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28, United States Code [28 USCS @

2112], and the Federal Rules of Appellate Procedure [USCS Rules of Court, Rules of Appellate Procedure].

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

NASD Manual

10000. CODE OF ARBITRATION PROCEDURE

10100. ADMINISTRATIVE PROVISIONS

10104. Composition and Appointment of Panels

The Director of Arbitration shall compose and appoint panels of arbitrators from the existing pool of arbitrators of the Association to conduct the arbitration of any matter which shall be eligible for submission under this Code. The Director of Arbitration may request that the Executive Committee of the National Arbitration Committee undertake the composition and appointment of a panel or undertake consultation with the Executive Committee regarding the

composition and appointment of a panel in any circumstance where he determines such action to be appropriate.

10300. UNIFORM CODE OF ARBITRATION

10308. Designation of Number of Arbitrators

(a) Except as otherwise provided in Rule 10302, in all arbitration matters involving public customers and where the amount in controversy does not exceed $30,000, the Director of Arbitration shall appoint a single public arbitrator knowledgeable in but who is not from the securities industry to decide the dispute, claim or controversy. Upon the request of a party in its initial filing or the arbitrator, the Director of Arbitration shall appoint a panel of three (3) arbitrators which shall decide the matter in controversy. At least a majority of the arbitrators appointed shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(b) In arbitration matters involving public customers and where the amount in controversy exceeds $30,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which consists of no fewer than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(c) An arbitrator will be deemed as being from the securities industry if he or she:

(1) is a person associated with a member or other broker/dealer, municipal securities dealer, government securities broker, or government securities dealer, or

(2) has been associated with any of the above within the past three (3) years, or

(3) is retired from any of the above, or

(4) is an attorney, accountant, or other professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years, or

(5) is an individual who is registered under the Commodity Exchange Act or is a member of a registered futures association or any commodities exchange or is associated with any such person(s).

(d) An arbitrator who is not from the securities industry shall be deemed a public arbitrator. A person will not be classified as a public arbitrator if he or she has a spouse or other member of the household who is a person who is associated with a member or other broker/dealer, municipal securities dealer, government securities broker, or government securities dealer.

9 U.S.C. § 10

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -- (1) Where the award was procured by corruption, fraud, or undue means. (2) Where

there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

NASD Manual

CERTIFICATION OF INCORPORATION - BY-LAWS

ARTICLE VI

Dues, Assessments and Other Charges

Power of Board to Fix and Levy Assessments

Suspension or Cancellation
of Membership or Registration

Sec. 3. The Corporation after fifteen (15) days notice in writing, may suspend or cancel the membership of any member or the registration of any person in arrears in the payment of any fees, dues, assessments or other charges or for failure to furnish any information or reports requested pursuant to Section 2 of this Article, or for failure to comply with an award of arbitrators properly rendered pursuant to Section 41 of the Code of Arbitration Procedure, where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied, or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the procedures specified by the Corporation.

Minnesota Statute § 549.20

§ 549.20 Punitive damages

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons,

and the severity of any criminal penalty to which the defendant may be subject.

California Civil Code § 3294

§ 3294. When permitted

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

9 U.S.C. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any

party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [9 USCS @@ 10, 11]. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Supreme Court, U.S.
FILED
MAR 6 1998
CLERK

No. 97-1101

In The

Supreme Court of the United States

October Term, 1997

MILTON BARNES,

Petitioner,

vs.

MARTIN LOGAN, KOREN LOGAN, Trustees for the Logan Inter Vivos Trust,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

DOES THE SAME STANDARD OF REVIEW OF ARBITRAL CLAIMS APPLY WHEN THE ARBITRATION PANEL HAS AWARDED PUNITIVE DAMAGES THAT WOULD OTHERWISE APPLY?

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PRAYER

Respondents, Martin and Koren Logan, respectfully request that the Court deny the Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals, Ninth Circuit entitled *Barnes v. Logan*, 122 F.3d 820 (9th Cir. 1997).

STATEMENT

The factual background of the matter presented by the Petition for a Writ of Certiorari of petitioner, Milton Barnes, largely comes from the parties' briefs and the opinions of the lower courts as no reporter's transcript reporting the underlying arbitration proceedings was made part of the record below. Therefore, the background and description of the arbitration proceedings are summarized in the decisions of the lower courts.

An arbitration panel of the National Association of Securities Dealers, Inc. ("NASD") heard evidence regarding the Logans' claims against petitioner Barnes and others that their account had been mismanaged and had declined in value from $464,000 to $269,000 in nine months, during which period petitioner Barnes had earned $123,000 in commissions. The arbitration panel heard evidence regarding the Logans' investment objectives, how petitioner Barnes managed the account, and related issues such as asserted misrepresentations by Barnes and whether Barnes had churned the account. The arbitration panel resolved these issues in the Logans'

favor and awarded them $261,561 in compensatory damages, plus $27,463 in pre-award interest, jointly and severally against petitioner Barnes, John G. Kinnard & Company, Inc., the brokerage firm with which Barnes was affiliated at the time of the transactions at issue, and another individual (Scott Grady). The panel also considered the Logans' request contained in their Statement of Claim and advocated at the hearing that punitive damages be assessed against Kinnard & Co., Grady, and Barnes. The panel then awarded the Logans $500,000 in punitive damages against Kinnard & Company and Grady, and $250,000 in punitive damages against petitioner Barnes. The district court denied Barnes' position to vacate the arbitration award and granted the Logans' motion to confirm the award.

REASONS FOR DENYING THE PETITION

I. Petitioner Failed to Raise All of His Arguments Below

The Ninth Circuit noted that Barnes had made "something akin to a due process argument" by contending that arbitral awards of punitive damages be subject to "some kind of 'heightened scrutiny.' " *Barnes v. Logan supra,* 122 F.3d at 824. Petitioner's argument in the Ninth Circuit was simply a variation on his contention that the arbitration panel had allegedly awarded punitive damages without proof of his financial condition in purported violation of California decisional law entitled *Adams v. Murakami,* 54 Cal.3d 105 (1991). Although Barnes now asserts in his petition that the award of punitive damages

against him was a "crushing financial penalty" and a "ruinous punitive damages award[ ]," he did not attack the award in the district court or on appeal on the grounds that it was excessive or disproportionate to the compensatory damage award, or beyond his means to pay, or disproportionate to his culpability.

Although petitioner did argue below for "heightened scrutiny" of the arbitration panel's award of punitive damages, he failed to articulate precisely what scrutiny to which he was contending he was entitled by either the district court in the first instance or the Ninth Circuit on appeal. Petitioner now contends in his petition that such judicial scrutiny must be "meaningful," but failed to argue below how the review he did receive was not "meaningful." The district court found that petitioner had agreed to arbitration fully aware of the nature of the proceedings involved and the "limited judicial review" afforded it. Petitioner failed to argue below how the various standards of review under which he sought to vacate the award – manifest disregard of the law and arbitral authority in excess of its powers under § 10(a) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(iv) – did not afford him meaningful review.

This and the failure of petitioner to present other due process arguments undoubtedly led the Ninth Circuit to characterize petitioner's arguments as "something akin to a due process argument." For example, petitioner did not argue to the district court or in his opening brief in the Ninth Circuit how NASD arbitrations or punitive damages assessed in them constitute state action. It was only when the Logans noted in their appellees' brief in the Ninth Circuit the absence of the state action component

that petitioner made the state action argument now contained in footnote five of his Petition for a Writ of Certiorari. As the Logans pointed out in their brief to the Ninth Circuit, numerous courts have held that state action required to trigger due process analysis is absent in arbitral proceedings. (See, e.g., *FDIC v. Air Florida System*, 822 F.2d 833, 842 n.9, *cert. den.*, 485 U.S. 987, 108 S. Ct. 1289 (9th Cir. 1988); *First Heritage Corp. v. National Association of Securities Dealers, Inc.*, 785 F. Supp. 1250, 1251 (D.D. Mich. 1992).

Barnes' petition contains other new arguments not presented below. Whatever sanctions may be imposed upon him by the NASD for failing to pay the Logans' award, or for engaging in the transactions at issue in the underlying arbitration proceedings, are not germane to his petition. Barnes' argument in his petition at pp. 11-12 regarding alleged differences between California Civil Code § 3294 and Minn. Stat. § 549.20 were only made to the Ninth Circuit in an unsuccessful petition for rehearing, and were only made after the Ninth Circuit held that Minnesota substantive law applied, notwithstanding petitioner's assertions about the applicability of California law and *Adams v. Murakami, supra.*

II. No Decision of this Court Holds That Due Process Requires Meaningful Judicial Scrutiny of Arbitral Awards of Punitive Damages

The assertion in Barnes' petition that the Ninth Circuit's decision is in direct conflict with decisions of this Court must be seen as hyperbole. No decision of this

Court cited by petitioner, or otherwise, holds that procedural due process or heightened judicial scrutiny is required to review arbitral punitive damage awards. Nor is the decision of the Ninth Circuit in this case, or the other Ninth Circuit decision attacked by petitioner, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991), alone in so holding. In fact, the Eleventh Circuit recently rejected a brokerage firm's contention identical to petitioner's that punitive damages awarded in securities arbitrations violate the Due Process Clause for lack of procedural protections and meaningful judicial review contrary to *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331 (1994) and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032 (1991). *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995).

In *Davis*, the Eleventh Circuit agreed with other courts which have held that the state action element of a due process claim is absent in private arbitration cases (citing *Federal Deposit Ins. Corp. v. Air Florida Sys., Inc., supra*, 822 F.2d 833, 842 n.9). 59 F.3d at 1191. The Eleventh Circuit then assumed arguendo that state action was involved, but rejected the brokerage's contention that *Honda Motor Co.* and *Haslip* required judicial review of arbitral awards of punitive damages. The Eleventh Circuit distinguished those cases as requiring judicial review of punitive damage awards by juries, but not where the parties have agreed to submit their dispute to arbitration, and have empowered the arbitrators to consider the issue

of punitive damages. *Davis v. Prudential Securities, Inc., supra,* 59 F.3d at 1192.[1]

Honda Motor Corp. v. Oberg is inapplicable for another reason. This Court struck down in that case an amendment to the Oregon Constitution that deprived courts of the authority to review the size of a punitive damage award or to order remittitur of excessive awards. 114 S. Ct. 2331. Specifically, the Court in *Honda* held that due process requires some type of meaningful review of the size of a punitive damage award. *Id.* at 2341. But petitioner did not challenge the size of the punitive damage award against him in the lower courts, and so *Honda* is of no avail to him.

Adams v. Murakami, supra, 54 Cal.3d 105, is similarly inapplicable as an expression of due process requirements for an award of punitive damages. In that case, the Supreme Court of California stated that it neither needed to decide nor was deciding whether evidence of a defendant's financial condition is a *constitutional* prerequisite under *Haslip* to an award of punitive damages in judicial proceedings. 54 Cal.3d at 118. (Original emphasis.)

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[1] See also *Park v. First Union Brokerage Services, Inc.,* 926 F. Supp. 1085, 1089 (M.D. Fla. 1996), rejecting a due process challenge to arbitral punitive damage award of $500,000 for lack of state action and because of voluntary nature of arbitration; *Jeppson v. Piper, Jaffray & Hopwood, Inc.,* 879 F. Supp. 1130 (D. Utah 1995), also rejecting a due process challenge by noting that under *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 113 S. Ct. 2711, 2720 (1993), a judgment that is the product of a process in which fair procedures were followed is entitled to a "strong presumption of validity."

The decisions of the lower courts in this case that arbitral awards of punitive damages are subject to limited judicial review was based upon the Ninth Circuit's decision in *Todd Shipyards Corp. v. Cunard Line, Ltd. supra,* 943 F.2d 1056, as well as the district court's factual finding that petitioner entered into the subject arbitration agreement fully aware of the nature of the proceedings involved and the limited judicial review it afforded. *Todd Shipyards* notes that due process arguments are particularly inappropriate where the parties have contractually agreed to the nature of arbitration and the limited judicial review afforded under it. The district court had referred to the arbitration disclosures in the subject customer agreement between Barnes and the Logans as follows:

> Arbitration is final and binding on the parties. The parties are waiving their right to seek remedies in court, including the right to jury trial . . . The arbitrator's award is not required to include factual findings or legal reasoning and any parties' right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

Petitioner's voluntary agreement to arbitration, and his voluntary acceptance of the limited judicial review following an adverse arbitration award, is reinforced by the employment form to which he refers in his Petition for a Writ of Certiorari (U-4) as well as the Uniform Submission Agreement he submitted to the NASD whereby he agreed to arbitrate the Logans' claim pursuant to the rules of the NASD. This Court held in *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 115 S. Ct. 1212 (1995) that the rules of the NASD authorize arbitrators to award punitive damages.

III. The Lower Courts' Factual Determination that Petitioner Agreed to Arbitration Fully Aware of the Limited Judicial Review Afforded It Is Not Clearly Erroneous

The standard of review for appellate courts reviewing the confirmation or vacation of an arbitration award is like "any other district court decision . . . accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*." *First Options, Inc. v. Kaplan*, 514 U.S. 938, 947, 115 S. Ct. 1920 (1995) (citation omitted). Here, as noted previously, the district court found as a matter of fact that petitioner entered into the arbitration agreement fully aware of the nature of the proceedings involved and the limited judicial review it afforded. No argument was made in the Ninth Circuit, nor can one be made now, that this determination is clearly erroneous.

IV. The Limited Record of the Underlying Arbitration Proceedings Militates Against Granting Certiorari

As noted, no transcript reflecting any reporting of the underlying arbitral proceedings was presented to the lower courts. None is therefore part of the record before this Court. Petitioner has no factual support for arguing that the award against him was "capriciously imposed."

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED, March 1998.

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